(10)

No. 88-1671-CSX
Status: GRANTED

Title: United States Department of Labor, Petitioner
v.
George R. Triplett, et al.

Docketed:
April 12, 1989

Court: Supreme Court of Appeals
of West Virginia

Vide:
88-1688

Counsel for petitioner: Solicitor General

Counsel for respondent: Fleisher,Barbara H., Moran,Jane, Marden,Jack, McKowen,James A.

Entry	Date	Note	Proceedings and Orders
1	Mar 11 1989	G	Application (A88-723) to extend the time to file a petition for a writ of certiorari from March 21, 1989 to April 20, 1989, submitted to The Chief Justice.
2	Mar 14 1989		Application (A88-723) granted by the Chief Justice extending the time to file until April 20, 1989.
3	Apr 12 1989	G	Petition for writ of certiorari filed.
4	May 16 1989		DISTRIBUTED. June 1, 1989
5	May 30 1989	F	Response requested -- BRW, HAB.
6	Jun 29 1989		Brief of respondent Triplett in opposition filed. VIDED.
7	Jul 12 1989		REDISTRIBUTED. September 25, 1989
8	Jul 12 1989	X	Reply brief of petitioner U.S. Dept. of Labor filed.
9	Oct 2 1989		Petition GRANTED. The case is consolidated with 88-1688, and a total of one hour is allotted for oral argument. **********
10	Oct 14 1989		Record filed.
		*	Certified copy of original record received. (Vide: 88-1688),
11	Nov 2 1989	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
12	Nov 13 1989		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
14	Nov 13 1989		Brief of petitioner United States filed. VIDED.
13	Nov 14 1989		Brief of petitioner Committee on Legal Ethics of the WV Bar filed. VIDED.
15	Nov 27 1989		SET FOR ARGUMENT TUESDAY, JANUARY 16, 1990. (1ST CASE)
16	Nov 29 1989		Record filed.
		*	Certified copy of transcrip received.
17	Dec 8 1989		CIRCULATED.
18	Dec 15 1989	X	Brief amicus curiae of United Mine Workers of America filed. VIDED.
20	Dec 15 1989		Brief amici curiae of Association of Trial Lawyers of America, et al. filed. VIDED.
19	Dec 16 1989	X	Brief of respondent George R. Triplett filed.
21	Jan 5 1990	X	Reply brief of petitioner United States filed. VIDED.
22	Jan 16 1990		ARGUED.

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88-1671
No.

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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QUESTION PRESENTED

Whether the attorney's fee provisions of the Black Lung Benefits Act, as applied, violate the Due Process Clause of the Fifth Amendment by denying claimants access to counsel.

PARTIES TO THE PROCEEDING

Petitioner, intervenor below, is the United States Department of Labor. Respondent, the respondent below, is George R. Triplett. The Committee on Legal Ethics of the West Virginia State Bar, the petitioner below, is a respondent in this Court under Rule 19.6 of the Rules of this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

The Acting Solicitor General, on behalf of the United States Department of Labor, petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals (App., *infra,* 1a-32a), is reported at 376 S.E. 2d 818. A dissenting opinion (App., *infra,* 33a-36a) and an opinion on rehearing (App., *infra,* 37a-41a) are unreported. The Findings of Fact, Conclusions of Law, and Recommendation Concerning Discipline of the Committee on Legal Ethics of the West Virginia State Bar (App., *infra,* 42a-51a), are unreported.

JURISDICTION

The judgment of the Supreme Court of Appeals was entered October 26, 1988. A petition for rehearing was denied on December 21, 1988 (App., *infra,* 52a). On March 14, 1989, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and

including April 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a) (1982 & Supp. IV 1986), incorporating various provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), and Section 28 of the LHWCA (33 U.S.C. 928 (1982 & Supp. IV 1986)), which is one of the provisions so incorporated, are set forth in an appendix (App., *infra,* 53a-56a).

The Department of Labor's regulations governing the payment of claimants' attorney's fees in black lung cases, 20 C.F.R. 725.365-725.367, are set forth in an appendix (App., *infra,* 57a-60a).

STATEMENT

In this case the Supreme Court of Appeals of West Virginia determined that the system for awarding attorney's fees in black lung cases violates the Due Process Clause of the Fifth Amendment, by denying claimants access to counsel. The court concluded that the attorney's fee system produces undue delays in payment and provides inadequate compensation, thereby discouraging most attorneys in West Virginia from representing claimants for black lung benefits. The court thus held that, as applied, the attorney's fee provisions are unconstitutional, and, consequently, the violation of those provisions cannot serve as the basis for attorney disciplinary proceedings.

1. The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* (1982 & Supp. IV 1986), "provides benefits to those who have become totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment," and to their eligible survivors.

Pittston Coal Group v. *Sebben*, 109 S. Ct. 414, 417 (1988). A claimant for benefits may be represented "in any proceeding for determination of a claim" by a qualified representative, including an attorney. 20 C.F.R. 725.362, 725.363. As part of its protection for eligible beneficiaries, the Act regulates the payment of fees for a claimant's attorney. See 30 U.S.C. 932(a) (1982 & Supp. IV 1986) (incorporating, *inter alia,* 33 U.S.C. 928 (1982 & Supp. IV 1986)). The Department of Labor has also issued comprehensive regulations governing the award of such fees. 20 C.F.R. 725.362-725.367.

Under the Act and the Department of Labor's regulations, an attorney for a black lung claimant is prohibited from charging a fee unless the fee has been approved by the appropriate agency or court. 33 U.S.C. 928(c); 20 C.F.R. 725.365. The regulations also provide that "[n]o contract or prior agreement for a fee shall be valid." 20 C.F.R. 725.365. When the claimant does not prevail in his effort to win benefits, no fee is approved. See *General Dynamics Corp.* v. *Horrigan,* 848 F.2d 321 (1st Cir.), cert. denied, 109 S. Ct. 554 (1988); *Director, Office of Workmen's Compensation Programs* v. *Hemingway Transport Inc.*, 1 Ben Rev. Bd. Serv. 73 (Ben. Rev. Bd. 1974). When the claimant does prevail in a contested case, the coal mine operator, its insurance carrier, or, in certain instances, the Black Lung Disability Trust Fund (administered by the Director of the Office of Workers' Compensation Programs in the Department of Labor) pays "a reasonable attorney's fee." 30 U.S.C. 932(a) (1982 & Supp. IV 1986) (incorporating 33 U.S.C. 928(a)); 20 C.F.R. 725.367.

The black lung regulations establish the procedures for applying for a fee and the criteria for its award. See 20 C.F.R. 725.366. The application must itemize the work done and note "the customary billing rate" of the person who performed it. *Ibid.* An approved fee "shall be reason-

ably commensurate with the necessary work done." 20 C.F.R. 725.366(b). The regulation identifies as factors to be taken into account in setting a fee "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested." *Ibid.*

An attorney must apply separately to the "deputy commissioner, administrative law judge, or appropriate appellate tribunal" before whom the services were performed. 20 C.F.R. 725.366(a). A claim begins with processing by a Department of Labor deputy commissioner. 20 C.F.R. 725.401. Any party can then request a de novo hearing before an administrative law judge (ALJ). 20 C.F.R. 725.419. The ALJ's decision is subject to review by the Benefits Review Board, and review of that decision is available in a court of appeals. 30 U.S.C. 932(a) (1982 & Supp. IV 1986) incorporating, *inter alia*, 33 U.S.C. 921(c); 20 C.F.R. 725.481, 725.482. An award of attorney's fees is not enforceable until the claimant receives a final award of benefits (33 U.S.C. 928(a)). An approved fee at that point "shall be paid promptly and directly by the operator or carrier to the claimant's attorney in a lump sum after the order becomes final." 20 C.F.R. 725.367(a). The fees ultimately paid do not include interest. See *Hobbs* v. *Director, Office of Workers' Compensation Programs,* 820 F.2d 1528, 1530-1531 (9th Cir. 1987). Nevertheless, the attorney's risk of loss and the delay in payment can be reflected in the hourly rate charged by claimant's attorney. See *Velasquez* v. *Director, Office of Workers' Compensation Programs,* 844 F.2d 738, 739 (10th Cir. 1988); *Hobbs,* 820 F.2d at 1529; *Thompson* v. *Potashnick Construction Co.*, 812 F.2d 574, 577 (9th Cir. 1987).

2. a. Beginning in 1978, respondent, a West Virginia lawyer, entered into contingent fee agreements with approximately fifteen black lung claimants (see App., *infra,* 2a, 46a-48a). These agreements entitled him to 25% of the back benefits recovered by the claimants as a result of his representation. *Ibid.* Between 1978 and 1983, claimants represented by respondent were awarded benefits, and he collected fees under the contingent fee arrangements. Since these fees were never approved by the appropriate agency or court, they were collected in violation of the statute and Department of Labor regulations. *Id.* at 47a-49a; see 33 U.S.C. 928(c), 20 C.F.R. 725.365.

In 1987, the Committee on Legal Ethics of the West Virginia State Bar began a disciplinary proceeding against respondent based on his violations of the Department's fee regulations. Following a hearing, the Committee found respondent to have engaged in professional misconduct. App., *infra,* 42a-44a. The misconduct consisted of "[h]is failure to abide by the [Department] regulation," a failure that constituted among other things, "conduct that is prejudicial to the administration of justice" and that "adversely reflects on his fitness to practice law". *Id.* at 50a (citing West Virginia Code of Professional Responsibility, DR 1-102(A)(4), (5), and (6) (1982)). The Committee filed a complaint in the Supreme Court of Appeals of West Virginia to enforce a recommended six-month suspension. App., *infra,* 1a.

b. The Supreme Court of Appeals denied enforcement of the suspension. App., *infra,* 1a-32a. The court held that the provisions for awarding attorney's fees under the black lung statute and the Department's regulations, as applied, "severely restrict [black lung] claimants' ability to find competent lawyers to represent them, and therefore the system violates due process." *Id.* at 24a. The court concluded that because the attorney's fee limitations were unconstitutional, respondent's failure to comply with the

Department's regulations did not violate West Virginia ethical rules.[1] *Id.* at 30a.

The court acknowledged that the Department's regulations "appear[] to provide for attorneys' fees that will fairly compensate competent counsel," but it nevertheless found that "the factual record before us reveals that this is not the case." App., *infra,* 16a. This "factual record" consisted solely of the affidavits of five attorneys submitted to the court as attachments to an amicus brief and of attorney testimony before a House of Representatives Subcommittee in 1985. *Id.* at 17a-20a (citing *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong., 1st Sess. (1985)). Based on that record, the court determined that the fee provisions manifested two inadequacies that deter "most" attorneys from taking on black lung cases. Those problems were "the long delay in payment, without any provision for interest, and the lack of premiums to offset the contingent nature of the work." App., *Infra*, 20a. The court added that "[t]his latter factor has become increasingly prominent as the approval rate [for claimants] has steadily declined" as a result of tighter eligibility criteria under 1981 amendments to the black lung statute. *Ibid.* The court cited an approval rate of 22.7% for claimants before an ALJ and 5.8% overall under the 1981 amendments. *Ibid.* The low approval rate, the court believed, established "not only the necessity of lawyer representation, but [also] the substantial risk that a lawyer will receive no fee at all for his work." *Ibid.*

[1] The court rejected the Committee's charge in its complaint that Triplett had misrepresented his fee arrangements to the Department, finding that the Committee had not adequately alleged such a violation and that the evidence did not support it in any event. App., *infra,* 5a-6a.

The court then evaluated the attorney's fee system under the three-factor test articulated by this Court in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), and *Walters* v. *National Association of Radiation Survivors,* 473 U.S. 305 (1985). App., *infra,* 20a-24a. Under this test, the court noted, it must weigh "the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, the probable value, if any, of additional or substitute procedural safeguards; and the Government's interest in adhering to the existing system." *Id.* at 8a (quoting *Walters,* 473 U.S. at 321). Applying those factors, this Court in *Walters* had upheld Congress's $10 fee limitation for attorneys in Veterans' Administration (VA) benefits proceedings, finding no due process violation. The court here applied the same factors to reach the opposite result.

First, the court identified two government interests in the regulation of fees in the black lung program: (1) the fee approval requirement serves "to ensure that neither the responsible operator nor the Trust Fund will be overcharged," and (2) the prohibition of private fee agreements serves "to protect claimants from improvident agreements that needlessly deplete their benefits." App., *infra,* 21a. The court discounted these interests, however, because of its view that the fee system in operation has made lawyers "almost entirely unavailable to claimants," with the result that "under the current system the claimant seldom has an award to share." *Ibid.*

Turning to the second factor, the court surmised that the absence of counsel poses a serious risk of an erroneous result. While acknowledging that it lacked statistics comparing the success rates of black lung claimants with and without counsel, the court asserted that the "black lung claims process is procedurally, factually and legally complex," and that "lawyer representation is virtually essential

to prevent erroneous deprivations of benefits for victims of black lung." App., *infra,* 22a-23a. The court found support for its determination in the experiences of respondent's clients, who, the court stated, had failed to win benefits without counsel but had succeeded in winning benefits with counsel. *Id.* at 22a. The court speculated that respondent's "clients can probably be taken as representative of most claimants." *Ibid.* The court added that the advantage of having an attorney in a black lung case distinguished this case from *Walters,* where veterans represented by counsel were only "marginally more successful" than those who proceeded without lawyers. *Id.* at 21a-22a. The court also observed that, in contrast to the network of veterans' groups in *Walters,* nonlawyer representatives are not widely available for black lung claimants. *Id.* at 23a.

Finally, the court evaluated the weight of the private interests at stake. In *Walters,* this Court had emphasized that VA benefits are awarded on the basis of disability rather than need, which reduced their weight in the analysis of the process that was due. 473 U.S. at 333. Although black lung benefits are also awarded on the basis of disability, not need, the court here insisted that the interest in obtaining black lung benefits deserved a weight comparable to the strong interest in retaining subsistence welfare benefits that was recognized in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). App., *infra,* 23a-24a. The court explained that since black lung benefits are awarded for total disability or death, they "may well provide the only means of subsistence" to claimants. *Id.* at 24a.

Summarily balancing these factors, the court concluded that "the system as currently administered denies claimants for black lung benefits property without due process of law by severely restricting their right to obtain epresentation by competent counsel." App., *infra,* 28a; *id.* at 24a. Without citing any specific provision of the Constitution, the court also discovered an "independent" constitutional ground for invalidating the fee system: it effectively denies "qualified claimants the procedural safeguards provided by Congress that are essential to vindicate the right to benefits granted by Congress." *Id.* at 24a-25a.[2]

Two justices dissented. App., *infra,* 33a-36a. The dissenting opinion noted that the majority had decided a constitutional question never raised below, and, as a consequence, "there is no factual record developed." *Id.* at 33a. In particular, the dissent stated that "[t]he ex parte affidavits" of attorneys practicing in the black lung field were "woefully inadequate" to sustain the finding that the black lung fee system deprived claimants of access to counsel. *Ibid.*

The dissent also found the majority's reliance on *Walters* to be "completely misplaced." App., *infra,* 33a. The dissent took issue with the majority's failure to give the appropriate deference to the " 'duly enacted and carefully considered decision' " of Congress (*id.* at 34a (quoting *Walters,* 473 U.S. at 319)), and recalled that this Court in *Walters* had stressed that " '[i]t would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law.' " App., *infra,* 34a-35a (quoting *Walters,* 473 U.S. at 326). Applying that standard, the dissent was convinced that no such " 'extraordinarily strong showing' has been made based on the generalized ex parte affidavits filed with this Court." App., *infra,* 35a (footnote omitted).

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[2] While not purporting to direct the Labor Department to adopt any particular fee regulations, the court suggested that the Department "could provide for a contingent fee," or could use a "multiplier * * * to enhance the 'normal' hourly fee to compensate for the risk of loss." App., *infra,* 25a.

3. Recognizing that its decision "involves an important question of federal law," the majority invited the Department of Labor to intervene as a party. App., *infra,* 30a. In response, the Department of Labor did intervene, to supplement the record and to petition for rehearing, but the petition for rehearing was denied (App., *infra,* 37a-41a). In a brief opinion, the court rejected or ignored the Department's arguments that the fee system advances important government interests and does not unduly hinder black lung claimants in obtaining counsel. In particular, the court ignored the argument that Congress specifically intended, in regulating fees, to shield claimants from improvident fee agreements and to prevent dissipation of their benefits through payments to attorneys. The court also ascribed no significance to the Department's argument that, especially in view of the Trust Fund's $3 billion debt to the government, the fee system serves an important governmental interest in avoiding overpayment. The court viewed this to be an argument that the current system of fees is justified as a way to keep down the number of successful claimants. *Id.* at 39a-40a.

As to the factual record, the Department presented statistics with its rehearing petition regarding the outcome of recent black lung cases before administrative law judges. App., *infra,* 40a. The statistics indicated that in 92% of cases resulting in an award or denial of benefits, the claimants had attorneys, and prevailed 29% of the time; in the remaining 8% of cases, the claimants proceeded pro se, and prevailed 11.6% of the time. *Ibid.* Without commenting on the overwhelming rate of representation at the ALJ level shown by these figures, the court read the statistics to mean only that claimants with counsel "have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se.*" *Ibid.* Thus, the court concluded, the Department "has simply reinforced

with more elaborate statistics the conclusion that we reached in the original opinion—namely, that a claimant's chance of prevailing when he is represented by counsel is substantially higher than when he appears *pro se.*" *Ibid.*

REASONS FOR GRANTING THE PETITION

The court below has declared unconstitutional the federal black lung attorney's fee system, as applied, in one of the nation's principal coal-mining states. That holding cannot be reconciled with the decisions of this Court addressing due process challenges to administrative procedures, and, in particular, is wholly at odds with the reasoning and result in *Walters* v. *National Association of Radiation Survivors, supra.* In *Walters,* this Court sustained against a due process challenge Congress's decision to limit to $10 the attorney's fee available in VA proceedings. Contrary to *Walters,* the court below failed to pay any deference to the congressional policy in favor of fee regulation, and relied on a factual showing far too meager to justify a sweeping conclusion that an Act of Congress is being unconstitutionally applied.

The decision below has important, and detrimental, practical ramifications. The black lung benefits program handles thousands of claims each year. The decision below substantially deprives black lung claimants in West Virginia of the protection against overreaching and against unjustified diminution of their benefits that Congress mandated in regulating attorney's fees. Although the decision does not preclude the Department's own enforcement of the attorney's fee limitations, it does remove the primary method on which the Department relies to enforce the fee provisions in West Virginia—state bar disciplinary proceedings. If not reversed by this Court, the decision may also encourage attorneys in other coal-mining States

to flout the black lung fee requirements. Because the decision below is wrong, and because it undermines the protection for black lung claimants envisioned by Congress, review by this Court is warranted.

1. The court's holding that the black lung fee system is unconstitutional cannot be squared with this Court's decisions regarding the regulation of attorney's fees. From the outset, the court below starkly misconceived its proper role by failing to pay the necessary deference owed to an Act of Congress. This Court has admonished that "[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that [the judiciary] is called upon to perform, and we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters,* 473 U.S. at 319 (citations and internal quotation marks omitted); *Rostker* v. *Goldberg,* 453 U.S. 57, 64 (1981); *Blodgett* v. *Holden,* 275 U.S. 142, 148 (1927) (Holmes, J.). The court below failed to heed that guiding principle. Instead, it insisted on drawing broad and unsound conclusions from a record far too sparse to serve as the basis for overturning an Act of Congress as administered by a federal agency.

In finding the black lung attorney's fee system to be unconstitutional, the court purported to follow this Court's established framework for assessing due process challenges. In executing that task, however, the lower court misapplied all three factors to which this Court has directed inquiry: (1) the private interest that will be affected, (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional or alternative procedural safeguards, and (3) the government's interest in adhering to the present system, including the fiscal and administrative burdens the

additional requirements would entail. *Walters,* 473 U.S. at 321; *Mathews,* 424 U.S. at 335.

a. The court significantly undervalued the government interests served by the black lung attorney's fee limits. Congress's purpose in regulating black lung attorney's fees is to protect claimants from improvident agreements that needlessly deplete their benefits. The regulation of attorney's fees in the black lung program results from Congress's incorporation of Section 28 of the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C. 928) into the Black Lung Benefits Act. The LHWCA has protected claimants against imprudent fee arrangements since its enactment in 1927. Act of Mar. 4, 1927, ch. 509, § 28, 44 Stat. 1438. The same reasons that prompted the regulation of attorney's fees in the LHWCA context are equally applicable here.

Section 28 of the LHWCA, as originally enacted, provided that no one may charge a claimant a fee unless approved by the appropriate court or administrative officer. *Ibid.* This provision was specifically designed to protect a class of unsophisticated workers who had been subjected to "sharp practices" of people who represented them. See *Hearing on H.R. 9498 Before the House Comm. on the Judiciary,* 69th Cong., 1st Sess. 40 (1926) (statement of Harry S. Austin, attorney for the International Longshoremen's Association) (*1926 House Hearings*); *Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary,* 69th Cong., 1st Sess. 68-69 (1926) (statement of O.G. Brown, Council of American Shipbuilders and the New York and New Jersey Dry Dock Association) (*1926 Senate Hearings*).[3] The provision was modeled on

[3] Both the Senate and the House considered bills requiring approval of claims for "legal services" for claimants' representatives. See H.R. 9498, 69th Cong., 1st Sess. § 38 (1926), *reprinted in* the *1926 House*

an early New York worker's compensation law, see *Banks* v. *Chicago Grain Trimmer's Ass'n,* 390 U.S. 459, 466 (1968), that was intended to "insure as large a return to the injured workman in compensation for injuries incurred in the course of his employment as possible." *In re Fisch,* 188 App. Div. 525, 177 N.Y.S. 338, 341 (1919).

The Black Lung Benefits Act has included the LHWCA fee provision since its enactment in 1969. See Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, Tit. IV, § 422, 83 Stat. 796.[4] As with LHWCA claimants,

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Hearings, supra, at 11; S. 3170, 69th Cong., 1st Sess. § 38 (1926), *reprinted in 1926 Senate Hearings, supra,* at 11. The attorney for the International Longshoremen's Association proposed a criminal sanction, modeled on New York's worker's compensation law, to strengthen the fee provision. *1926 House Hearings, supra,* at 40. The attorney for the Council of American Shipbuilders and the New York and New Jersey Dry Dock Association pointed out that limiting approval requirements to "legal services" allowed non-lawyers to exploit injured workers and suggested that only lawyers be allowed to represent claimants. *1926 Senate Hearings, supra,* at 68-69. The Senate later passed a bill incorporating a criminal sanction and requiring approval of claims for legal services "or for any other services rendered in respect of a claim," *1926 House Hearings, supra,* at 129; the full provision of that bill was enacted without change in 1927. In 1972, when Congress added a fee shifting provision to Section 28, it reaffirmed the principle that "no fee may be received unless approved" by the appropriate court or administrative official. H.R. Rep. No. 1441, 92d Cong., 2d Sess. 21 (1972).

[4] The fee provisions, and other portions of the Longshore statute, were added to Part C of the black lung statute in conference. See H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. 89-91 (1969). During debate on the conference report, supporters of the legislation uniformly stated their intent to incorporate into Part C the enumerated Longshore provisions. See 115 Cong. Rec. 39,707, 39,709 (Rep. Perkins), 39,712-39,713 (Rep. Dent); 39,718 (Rep. Burton); 39,996 (section-by-section analysis of the Conference Report, presented by Sen. Williams); 39,999 (Sen. Javits).

black lung claimants are susceptible to exploitation because they typically have limited education. See U.S. Department of Labor, Employment Standards Admin., *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14 (1983) (while some widows have more education, three-fourths of miners did not attend high school). "[R]ational paternalism" in restricting fees is a proper legislative purpose (*Walters,* 473 U.S. at 323), especially when, as in this instance, the claimant population is susceptible to exploitation that might deprive them of their full share of benefits.

This Court long ago recognized the legitimacy of protecting claimants "against improvident contracts, in the interest not only of themselves and their families, but of the public." *Yeiser* v. *Dysart,* 267 U.S. 540, 541 (1925) (upholding provision in Nebraska worker's compensation statute requiring approval of fees charged a claimant). The court below gave that congressional policy short shrift because of its view that "under the current system the claimant seldom has an award to share." See App., *infra,* 21a. Like the district court in *Walters* (473 U.S. at 323), the West Virginia court erred by "cavalierly dismissing" Congress's long-asserted purpose.

The court also erred by ignoring the impairment of other government interests that would flow from its preferred fee system. The court suggested that the Department could adopt a statewide "multiplier" to compensate claimant's attorneys for their risk of loss. App., *infra,* 25a. But that approach would drive up costs to operators and, more particularly, to the Black Lung Disability Trust Fund, which is already some $3 billion in debt to the federal treasury. See *Id.* at 39a.

Moreover, it is unclear what kind of a multiplier would be permissible in view of this Court's opinion in *Pennsyl-*

vania v. *Delaware Valley Citizens' Council for Clean Air*, 107 S. Ct. 3078 (1987), where four Members opposed any risk of loss enhancement in fee-shifting arrangements (*id.* at 3087) and a fifth Member found an enhancement permissible only when limited to the range necessary to attract competent counsel in the local market (*id.* at 3090-3091 (O'Connor, J., concurring)). Judging from the experience of lower courts, see, *e.g.*, *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 842 F.2d 1436, 1451-1452 (3d Cir. 1988), the court's proposed multiplier would likely lead to expensive and counterproductive litigation over fees. See also *Levins* v. *Benefits Review Board*, 724 F.2d 4 (1st Cir. 1984) (employers have due process rights to hearings to contest attorney's fees). Likewise, the court's proposal (App., *infra*, 25a) to allow contingent fees would defeat Congress's purpose of preserving as much as possible of the pool of benefits for the claimant. Those problems underscore the government's interest in adhering to the present system, which fairly compensates claimants' attorneys without the complications caused by the alternatives proposed by the court.[5]

b. Given the weight of these government interests, as the dissent here recognized, "[i]t would take an extraordinarily strong showing of probability of error under the

[5] As discussed above (at 4), the hourly component of the fee award can *now* take into account the delay in payment, as well as the risk of loss borne by the attorney. See *Velasquez*, 844 F.2d at 739; *Hobbs*, 820 F.2d at 1529; *Potashnick Construction Co.*, 812 F.2d at 577. These provisions for delay and risk of loss satisfy the statutory requirement that a prevailing attorney obtain a "reasonable fee" (33 U.S.C. 928(a)). Indeed, for meritorious claims, existing procedures could result in a greater attorney's fee for the claimant's lawyer than would be available under a contingent fee arrangement. Cf. *Blanchard* v. *Bergeron*, 109 S. Ct. 939 (1989) (reasonable attorney's fee under 42 U.S.C. 1983 not limited to contingent fee agreement).

present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law." App., *infra*, 34a-35a (quoting *Walters*, 473 U.S. at 326). There plainly was no such showing here.

To begin, the court's pivotal conclusion—that the fee system had produced a shortage of lawyers—lacks any adequate foundation in the record. The court relied solely on a few attorney affidavits, together with excerpts from congressional testimony expressing a general unhappiness with the fee system and a belief that there was a consequent shortage of attorneys. App., *infra*, 16a-20a. That sort of impressionistic evidence is not sufficient to sustain a finding of unconstitutionality for an administrative program receiving 7,000 or 8,000 new claims a year—as the Department of Labor says is the case with the Black Lung Program—particularly when the Department presented statistics showing a 92% rate of representation at the ALJ level. This Court has made clear its rejection of such "anecdotal evidence" to sustain across-the-board findings about the operation of vast federal programs. See, *e.g.*, *Walters*, 473 U.S. at 324 n.11. The court here failed even to acknowledge the Department's evidence of the high rate of representation of black lung claimants at the ALJ level, thereby overlooking its obligation to consider "the risk of error inherent in the truth-finding process as applied to the *generality* of cases." *Walters*, 473 U.S. at 321 (emphasis added).

Moreover, even assuming that substantial numbers of attorneys are generally unavailable, the court never adequately explained how the present fee system bears responsibility for the attorney shortage. The 5% initial approval rate of claims under the 1981 amendments to the black lung statute may well be a significant factor discouraging attorney representation (App., *infra*, 14a n.15, 20a. This low rate derives naturally from Congress's deci-

sion to tighten black lung eligibility standards in 1981.[6] See Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643 (1981); 127 Cong. Rec. 31,979 (1981) (statement of co-sponsor Sen. Nickles contemplating a 4% approval rate under the 1981 amendments). Reduced attorney interest can reasonably be expected in a litigation area with limited chances of success, but that result cannot rationally be attributed to the fee system.

Similarly, the court erroneously seized on the delay in black lung adjudications and in the payment of fees as a key reason for the unavailability of claimants' attorneys (App., *infra,* 20a). Delays also exist for claims adjudicated under earlier versions of the law that are more favorable to claimants—and attorneys are widely available to handle such claims. See *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor,* 99th Cong., 1st Sess. 103 (1985) (statement of Gerald F. Sharp, counsel for District 28, UMW). Delay in payment, therefore, is not the determinative factor in any attorney shortage that may exist.[7]

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[6] Of course, Congress's choice to tighten eligibility standards raises no due process question. See *Schweiker* v. *Wilson,* 450 U.S. 221, 238 (1981).

[7] Congress and the Department of Labor are aware of the delay resulting from the 1978 amendments to the black lung statute, which required the reopening of about 200,000 claims. See *Report to the Honorable Donald J. Pease, House of Representatives, by the U.S. General Accounting Office, Adjudication of Black Lung Claims by Labor's Office of Administrative Law Judges and Benefits Review Board* App. I 7 (Oct. 26, 1984). The Department has made substantial progress in eliminating the backlog at the ALJ level, though delays still exist at the Benefits Review Board. See *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Eaucation and Labor,* 100th Cong., 2d Sess. 67 (1988) (statement of Rep. Wise).

The court also marshalled no persuasive evidence to show that in the "generality of cases" (*Walters,* 473 U.S. at 330), attorneys materially improve the results for black lung claimants. In its initial opinion, the court relied exclusively on the experiences of the handful of claimants represented by respondent. The court found it significant that after retaining respondent as their lawyer, those claimants had obtained benefits that had been previously denied. App., *infra,* 22a. But even if the improved results in those few cases were attributable to respondent's efforts, there was no basis for the court's speculation that these claimants "can probably be taken as representative of most claimants." *Ibid.*

Moreover, in its opinion on rehearing, the court seriously misconstrued the Department's statistics as showing that lawyers necessarily produce a better outcome for claimants. *Id.* at 40a (characterizing the statistics as "conclusively demonstrat[ing] that at the [ALJ] level, claimants represented by counsel have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se*"). The Department's figures do not support any inference that attorneys were the reason for the difference in outcome noted by the court. Most critically, almost all (92%) of the claimants *were* represented by counsel and only a small percentage of the claimants proceeded pro se. That fact significantly undercuts the use of comparative success rates as a ground for concluding that pro se claimants win less frequently *because* they lack lawyers. An equally likely explanation of the results is that the pro se claimants simply failed to attract lawyers because their cases were not strong enough. Compare *Lassiter* v. *Department of Social Services,* 452 U.S. 18, 29 n.5 (1981) (similar statistics were "unilluminating"). Even if the fee system discourages representation in such marginal cases, it remains true that "a process which is sufficient for the large majority of a

group of claims is by constitutional definition sufficient for all of them." *Walters,* 473 U.S. at 330.

c. Finally, by giving too much weight to the private interest affected, the court erred in its analysis of the third factor in the *Mathews* test. In both *Walters* and *Mathews,* this Court stressed that the disability benefits involved were not based on need, nor did they constitute a recipient's sole means of livelihood. The same is true here. The court's efforts to categorize black lung benefits as similar to the subsistence welfare benefits in *Goldberg* v. *Kelly* ignores this Court's previous assessment of the relative weight of disability benefits for due process purposes. As the Court explained in *Mathews* (424 U.S. at 340), the unusually heavy weight given the private interest in *Goldberg* came from the unique nature of welfare as "assistance * * * given to persons on the very margin of subsistence * * *." Terminating aid " 'may deprive an *eligible* recipient of the very means by which to live while he waits.' " *Ibid.* (quoting *Goldberg*). This factor is " 'not present in the case of * * * virtually anyone else whose governmental entitlements are ended.' " *Ibid.* (quoting *Goldberg*; ellipsis in *Mathews*). Here, as in *Mathews,* the disability benefits sought are but one form of government aid that claimants may seek. *Id.* at 342. Thus, the court below erred in placing black lung benefits on the same plane as the welfare payments in *Goldberg.*[8]

[8] Additionally, the court appeared to believe (App., *infra,* 23a) that applicants for benefits, who have not yet been found eligible, have as strong a "property" interest in benefits as current recipients, who have been found eligible for benefits under an entitlement program. This Court has never held that applicants have any property interest at all under the Fifth Amendment, much less that an applicant's interest is equal to a recipient's. See *Lyng* v. *Payne,* 476 U.S. 926, 942 (1986).

In sum, the lower court erred by ignoring or trivializing important government interests, overemphasizing claimants' interests, and failing adequately to assess the effect of the fee system on the availability of claimants' attorneys. The court's determination that the black lung fee system violates the due process rights of claimants rests on an entirely inadequate factual record, and should be reversed.[9]

2. The court's declaration that the black lung fee system is unconstitutional allows West Virginia attorneys to enter into fee arrangements with black lung claimants without the risk of state bar disciplinary sanctions. Attorneys may thus charge claimants contingent fees, contrary to the Department's regulations and to the intent of Congress that a claimant's contested award be preserved intact for the claimant. Also contrary to the statute, attorneys may charge fees to claimants who will never even receive benefits.

West Virginia is an important state for such a gap in protection to emerge. The Department of Labor informs us that, in fiscal year 1987, approximately 18% of the 8,292 black lung filings arose in West Virginia, and it estimates that a comparable percentage of the approximately 7,000 benefit filings in fiscal year 1988 were in that State. The court's decision therefore affects attorneys who handle almost one-fifth of the claims filed in the black lung program.

[9] The alternative theory advanced by the court—that it was unconstitutional for the Department to administer a process that denied claimants access to benefits that Congress has provided—simply restates the due process claim in a different guise and therefore has no "independent significance." *Walters,* 473 U.S. at 335 (rejecting claim that the $10 fee limitation violated the First Amendment because that claim is "at base, * * * inseparable from the[] due process claim").

Removing the state bar's disciplinary proceedings as a sanction will significantly damage the Department of Labor's ability to protect claimants from inappropriate and unlawful fees. The Department advises us that it relies on such proceedings as the primary means of enforcing the black lung fee requirements. Existing regulations are unlikely to fill the void left by the court's holding here. As a practical matter, the Department's multi-level, case-by-case system of adjudication is simply not equipped to undertake an investigation into conduct that typically involves multiple claimants and comes to light after claims have been finally adjudicated.[10] Moreover, criminal prosecution is not an effective tool to deal with unlawful fee arrangements. Indeed, while the LHWCA authorizes fines or imprisonment for unauthorized fee activities (33 U.S.C. 928(e)), that provision has been held not to be incorporated into the black lung statute. *United States* v. *Carter*, 760 F.2d 266 (4th Cir. 1985) (per curiam).[11]

[10] As discussed above (at 4), black lung claims and fee petitions are processed first by deputy commissioners in the Office of Workers' Compensation Programs (OWCP) and may then go to ALJs and the Benefits Review Board. Deputy commissioners have general authority to issue "appropriate orders" (20 C.F.R. 725.351(a)(5)), but such a provision may not be specific enough to allow discipline. See *Camp* v. *Herzog*, 104 F. Supp. 134, 137-138 (D.D.C. 1952); J. Stein, G. Mitchell & B. Mezines, *Administrative Law* § 42.02[1], at 42-17 (1987). While an ALJ has authority to exclude an attorney from the proceeding because of unethical or improper conduct (29 C.F.R. 18.34(g)(3)), the provision has not been tested as a general means of enforcing the fee requirements. The Benefits Review Board may exclude attorneys whose conduct merits a suspension or loss of license (see 53 Fed. Reg. 16,519 (1988), adding 20 C.F.R. 802.202(e)), but this provision cannot be used against West Virginia lawyers in light of the Supreme Court of Appeals' decision here that violations of the Department's regulations are not unethical.

[11] It is also generally difficult to prove that entering into a fee agreement satisfies the elements, for example, of mail fraud or obstruction of justice (see 18 U.S.C. 1341, 1505; cf. RXs 16, 17; App., *infra*, 5a-6a (court's finding that respondent's conduct did not involve misrepresentation)), even if as happened here, the threat of prosecution results in an attorney's agreement to reimburse clients, (see RXs 16, 17 to hearing before Committee on Legal Ethics concerning respondent's pre-trial diversion).

It is difficult, of course, to predict the extent to which the court's holding will encourage noncompliance with the black lung fee requirements either in West Virginia or elsewhere. But based on past experience in the black lung program, it is likely that some lawyers will take advantage of the court's decision by entering into unsupervised fee arrangements. In its early years, the black lung system witnessed certain lawyers "soaking coal miners with fat fees for very little work" (see House Comm. on Education and Labor, 96th Cong., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977*, at 1 (Comm. Print 1979) (Statement of Rep. Heckler)), and the Department advises us that it continues to see attorneys entering into contingent fee agreements or other unapproved arrangements. See, *e.g.*, *Wells* v. *Director, Office of Workers' Compensation Programs*, 9 Black Lung Rep. 1-63 (Ben. Rev. Bd. 1986); *In re Shoemaker*, 11 Black Lung Rep. 3-145 (ALJ 1988); *Taylor* v. *Director, Office of Workers' Compensation Programs*, 11 Black Lung Rep. 3-184 (ALJ 1988).[12]

As a practical matter, while the decision below will not directly prohibit the Department from enforcing its fee

[12] The record in this case substantiates the prevalence of such conduct. Cf. Tr. 14 (statement by respondent's attorney at the hearing before the State Bar: "I think we all know that it's something that a lot of attorneys were doing, were taking their contingent fee contracts on these Black Lung cases"); Tr. 178 (testimony by Floyd Gibson, a former member of Committee on Legal Ethics, that there was a strong feeling, discussed regularly among attorneys, that the government did not have any business regulating black lung attorney's fees).

regulations, it threatens to expose black lung claimants to precisely the harms that Congress has sought to prevent. It is not for the courts to revise Congress's economic and social policies under the aegis of general constitutional guarantees, particularly on a factual record as frail as the one here. The policy choices in the black lung program reflect a careful balance of competing values, after examination by Congress and by the agency charged with administering the program. Courts should not use the Due Process Clause as the vehicle for redetermining federal policy with respect to the reasonable regulation of attorney's fees.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1989

APPENDIX A

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 18396

COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR

v.

GEORGE R. TRIPLETT

[Filed Oct. 26, 1988]

Chief Justice McHugh and Justice Miller dissent and reserve the right to file a dissenting opinion.

Disciplinary Proceeding — Attorney Exonerated

NEELY, Justice:

This is a disciplinary proceeding brought by the Committee on Legal Ethics of the West Virginia State Bar (the "Committee") against George R. Triplett, a member of the Bar. The Committee has recommended a six month suspension of Mr. Triplett's license to practice law for his alleged violation of DR 1-102(A)(4), (5), and (6) of the West Virginia Code of Professional Responsibility which provide:

DR 1-102—Misconduct—(A) a lawyer shall not: (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (5) Engage in conduct that is prejudicial to the administration of justice; (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

The respondent failed to abide by regulations promulgated under the federal Black Lung Benefits Act, 30 U.S.C. 901, *et seq.*, for the collection of attorneys' fees in black lung cases.

The regulations at issue in this proceeding require that any attorney fee be approved by the Department of Labor; consensual arrangements between lawyers and clients for contingent fees are prohibited. Mr. Triplett asked his clients to execute contingent fee contracts allowing him 25 percent of accrued benefits. He did not seek Department of Labor approval for these arrangements and sought no fee whatsoever from the Department. When his clients prevailed, they paid Mr. Triplett, who put the money into bank accounts in his name as agent, trustee, or "attorney on escrow" for the individual clients.[1] The committee found the respondent guilty of professional misconduct reflecting on his fitness to practice law in violation of DR 1-102(A)(4), (5) and (6).

I

Introduction

Black lung cases are initiated when a miner files a claim with the Department of Labor (DOL). The claim is then

[1] Respondent testified that he heard discussion among the plaintiff's bar that the DOL regulations might be changed to allow contingent fees and, therefore, he put the money into escrow accounts awaiting that time. Record at 235, 257-8, 269. Respondent has returned all of the fee money, with interest, to his clients.

reviewed at the administrative level by a claims examiner or the deputy commissioner, and approved or denied after a medical examination by a DOL doctor. The claimant and defendant operator (if one can be identified) are then allowed to submit additional evidence and have the case reconsidered, again at the deputy commissioner level. Either side can then appeal the decision of the deputy commissioner to the Office of Administrative Law Judges (OALJ) and, from that decision, appeal to the Benefits Review Board (BRB). Appeal from a decision of the BRB lies in the U.S. Court of Appeals for the circuit in which the injury (last exposure) arose. 33 U.S.C. § 921(C). Benefits are awarded on a finding of total disability or death due to pneumoconiosis ("black lung"), and are payable by either the responsible operator (if one can be identified) or the Black Lung Disability Trust Fund. Who pays the claim depends on a number of factors including whether a responsible operator can be identified, when the claim was filed, and the date of last exposure.

Section 932 of the Black Lung Benefits Act (30 U.S.C. § 901 *et seq.*) incorporates several provisions of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901 *et seq.*) including 33 U.S.C. § 928 which provides that no one who represents a claimant shall be paid a fee unless it is approved by the deputy commissioner, the board or the court before whom the work is performed. Anyone who receives an unapproved fee is subject to a fine of $1,000 or imprisonment for not more than one year, or both.[2] If a defendant employer declines to pay compensation within thirty days of receiving written notice of the claim, and the claimant thereafter uses the services of a lawyer to win his claim, the deputy commissioner, the board or the court awards a reasonable attorney's fee to be

[2] 33 U.S.C. 928(c) and (e).

paid directly by the employer to the lawyer.[3] In cases where the claimant pays the attorney's fee, the DOL withholds part of the benefits when a claimant prevails until the lawyer files a fee petition that, when approved, is paid from the withheld funds.

Regulations promulgated under the Black Lung Benefits Act define the procedure and criteria for awarding attorneys' fees. 20 C.F.R. § 725.365 provides, in part:

> No fee charged for representation services rendered to a claimant with respect to any claim under this part shall be valid unless approved under this subpart. No contract or prior agreement for a fee shall be valid. . . .

20 C.F.R. § 725.366 provides in part:

> A representative seeking a fee for services performed on behalf of a claimant shall make application therefor to the deputy commissioner, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed. The application shall be supported by a complete statement of the extent and character of the necessary work done . . .

The criteria for determining fees are listed in 20 C.F.R. § 725.366(b).[4] Subsection (e) of 20 C.F.R. § 725.366 pro-

[3] 33 U.S.C. 928(a).

[4] The text of § 725.366(b) reads:

> Any fee approved under paragraph (a) of this section shall be reasonably commensurate with the necessary work done and shall take in to [sic] account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested. No fee approved shall include payment for time spent in preparation of a fee application. No fee shall be approved for work done on claims filed between December 30, 1969, and June 30, 1973, under Part B of Title IV of the Act, except for services rendered on behalf of the claimant in regard to the review of the claim under section 435 of the Act and Part 727 of this subchapter.

vides that a fee award by a deputy commissioner that is challenged may be reviewed by the Benefits Review Board. Because a fee is awarded only in the event a claimant is successful, lawyers are not paid at all in unsuccessful cases.

The Committee, in a Supplemental Memorandum, argues that any problems associated with black lung fee limitations are irrelevant because they did not charge Respondent with collecting an illegal fee under DR 2-106, but rather with ". . . *misrepresentation* to the Department of Labor regarding his intentions to collect a fee." Complainant's Supplemental Memorandum. However, this argument is not supported by the Committee's own *Full Hearing Panel Findings of Fact, Conclusions of Law and Recommendation Concerning Discipline.* In its *Conclusions of Law* at 6-7, the Committee lists the documentary evidence which establishes that Respondent knew DOL fee approval was required and, in several cases, that he authorized the DOL to release to the respective clients the portion of benefits retained to pay attorneys' fees. In these cases, Respondent also informed the DOL that he was not going to submit fee applications for their approval. The Committee says these documents

> . . . are all strong evidence of the knowledge of Respondent that the way to have a fee paid for his successful representation of his Black Lung clients was to file a petition for fees as provided by Section 725.365 of the Regulations. His failure to abide by the regu-

lation make [sic] him guilty of violation of DR 1-102 (A)(4), (5) and (6) . . .

It is evident, then, that the Committee found Respondent's misconduct to be his knowing violation of the DOL regulations, not his alleged misrepresentation to the DOL regarding his intentions to collect a fee. Moreover, had the Committee stated in its *Conclusions of Law* that Respondent lied to the DOL, such a finding would not have been supported by the record. The evidence establishes that Respondent communicated to DOL representatives that he would not submit fee applications to them in most of his cases. There is no evidence in the record that Respondent told the DOL he would not collect fees directly from his clients. In fact, the record suggests that the DOL, at least in one case, suspected the Respondent was collecting fees directly in violation of the regulations because they sent him an admonition against doing so.[5]

The gravamen of Respondent's alleged professional misconduct is not statements he made to the DOL, but his collection of fees in knowing violation of DOL regulations. The defendant argues in mitigation that the black lung attorneys' fees provisions, as they are applied, make it almost impossible for claimants to find competent counsel to represent them. Several lawyers who appeared on behalf of respondent testified about their own experience representing black lung claimants.[6] These lawyers were, at best, not paid adequately or promptly. Some were not

[5] *See* State Bar exhibit 3.

[6] Record at 196-198, testimony of William M. Miller stating that he has won three or four cases for claimants but has not been paid in any of them, including a case in which his client was awarded over thirty thousand dollars in back benefits in 1980; record at 206, testimony of James F. Cain stating that he no longer accepts black lung cases due to the difficulty of getting paid.

paid at all. This Court, then, perceived that if the allegations of respondent and his supporting witnesses that claimants cannot find counsel because of DOL fee limits were true, this case presented a significant constitutional issue. Accordingly, we invited interested parties to file additional briefs.

II

The Constitutional Issue

The question now before us is whether the federal limits on attorneys' fees in black lung cases violate the due process clause of the Fifth Amendment to the *Constitution of the United States* by effectively denying claimants necessary access to counsel. Answering this question raises both factual and legal issues: the mere denial to a claimant of counsel of his choice (or for that matter, any counsel) does not necessarily imply a denial of due process rights. Fortunately, the U.S. Supreme Court has set clear, bright line standards under which we can decide the legal issues of this case in *Walters v. National Ass'n. of Radiation Survivors*, 473 U.S. 305 (1985).

III

Due Process Analysis under *Walters*

In *Walters*, the U.S. Supreme Court upheld the constitutionality of a statute that limits to ten dollars the fee that may be paid a lawyer or agent who represents a veteran seeking benefits from the Veteran's Administration (VA).[7] In *Walters*, the plaintiff veterans argued that the fee limitation effectively precluded them from obtaining counsel and, therefore deprived them of property without due process of law. However, in answer to this asser-

[7] The fee limitation was first enacted in 1862 during the Civil War.

tion, the Supreme Court pointed out that due process is a flexible concept that requires a balancing of interests; thus, there is no *absolute* right either to a trial-like hearing or to representation by counsel in every proceeding that adjudicates a property right. More specifically, the Court applied the test set out in *Matthews v. Eldridge,* 424 U.S. 319 (1976):

> . . . which requires a court to consider the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedural safeguards, and the government's interest in adhering to the existing system . . . In applying this test we must keep in mind, in addition to the deference owed to Congress, the fact that the very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." [citations omitted]

473 U.S. at 321. The Court went on to conclude that the government interest in the fee limitation in veterans' cases was to ensure:

> . . . that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer. [citations omitted]

Id.

In *Walters,* the Court pointed out that destruction of the fee limitation in VA cases would result not only in claimants' paying over part of their benefits to lawyers, but would also complicate a process that Congress intended to keep uncomplicated and non-adversarial. The resulting transformation of the current VA system to a complicated, adversarial one would then virtually require claimants to hire lawyers to be successful. 473 U.S. at 323-324. The increased complexity, in turn, would require greater administrative costs, which would leave less money available for benefits. Accordingly, the Court reasoned, the government interest in the fee limitation was entitled to great weight. To prevail against such a reasonable congressional policy required an ". . . extraordinarily strong showing of probability of error under the present system – and the probability that the presence of attorneys would sharply diminish that possibility . . ." 473 U.S. at 326.

The Court frankly admitted in *Walters* that it was not possible to quantify exactly the danger of erroneous deprivation under the present system. However, the Court was quick to point out that only 16 percent of the cases that are appealed to the Board of Veterans Appeals (BVA) are reversed, which suggests a relatively low danger of erroneous deprivation if one assumes the BVA decision to be the "correct" result in every case. 473 U.S. at 327.

In *Walters,* the court made an important factual finding that lifting the fee limitation would not significantly reduce the danger of erroneous deprivation of veterans' benefits. For this finding the Court relied on statistics correlating the rate of ultimate success by claimants before the BVA by mode of representation. These statistics demonstrated that claimants who were represented by lawyers (*pro bono*) were only marginally more successful than *pro se* claimants or claimants represented by veterans'

organizations.[8] The Court noted that various veterans' service organizations supply high quality representation for any claimant who requests it regardless of a claimant's affiliation with a veterans' organization. 473 U.S. at 311-312. Congress had recently considered proposals to modify the fee limitation, and a Senate Committee report in 1982,[9] stated that body's concern

> "that any changes relating to attorneys' fees be made carefully so as not to induce unnecessary retention of attorneys by VA claimants and not to disrupt unnecessarily the very effective network of non-attorney resources that has evolved in the absence of significant attorney involvement in VA claims matters."

473 U.S. at 322.

The Court in *Walters* specifically rejected the veterans' argument that the Veterans Administration's procedures are so complex, procedurally and factually, that they require lawyer representation of claimants. Although the Court conceded that cases of agent orange or radiation exposure might be considered "complex," these cases constituted, at most, two percent of appeals to the BVA. In conformance with the principle that the fundamental fairness of a procedure depends on the risk of error inherent in the truth-finding process as applied to the generality of cases rather than the rare exceptions, the Court was not persuaded that the VA process should be changed to accommodate the "rare exception" of "complex" cases. 473 U.S. at 328-330.

[8] The following statistics were taken from the record and relied upon by the Court. 473 U.S. at 327.

ULTIMATE SUCCESS RATES BEFORE THE BOARD OF VETERANS APPEALS BY MODE OF REPRESENTATION

American Legion	16.2%
American Red Cross	16.8%
Disabled American Veterans	16.6%
Veterans of Foreign Wars	16.7%
Other non-attorney	15.8%
No representation	15.2%
Attorney/Agent	18.3%

[9] The proposed bill allowed limited judicial review of BVA decisions and payment of attorneys' fees for representation in that review, but the bill was never enacted. 473 [U.S.] at 322, note 10.

Finally, the Court examined the nature of the property interest at issue. In *Goldberg v. Kelly,* 397 U.S. 254 (1970), the Court held that a welfare recipient subject to possible termination of benefits was entitled to a lawyer. In *Matthews v. Eldridge, supra,* the Court held that social security disability benefit recipients had no right to a pre-termination, trial-like hearing. The Court found that the benefits at stake in VA proceedings, which are not granted on the basis of need, are closer to the social security benefits in *Matthews* than they are to welfare payments ". . . upon which the recipients in *Goldberg* depended for their daily subsistence." 473 U.S. at 332-333.

IV

History of Black Lung Legislation

There currently exists in the State of West Virginia a large population of elderly, sick coal miners, their dependents and their survivors. Many have waited for extended periods for administrative review of their black lung claims. Others have had their claims denied, and have subsequently been unable to obtain counsel to review and prosecute their cases.

A high price is demanded of those who extract the life's blood of West Virginia's economy from the arteries in her mountains. As his lungs become clogged with insidious and pervasive dust, the miner is given a graphic projection

of the quality of life that lies ahead. The nature of the disease being progressive, the miner feels himself increasingly weakened and helpless, unable to provide even the most modest means of support for his family.

The full extent of the debilitating impact of long term exposure to coal dust was recognized with the passage of Title IV of the Federal Coal Mine and Safety Act of 1969.[10] This legislation was Congress' acknowledgement of the failure of state workers' compensation programs to address the devastating effects of black lung. The original legislation covered only underground miners and their wives or widows, and allowed recovery of benefits only in cases of total disability or death. The original legislation divided claims into Part B claims—those filed before 31 December 1972, to be administered by the Secretary of Health Education and Welfare (HEW), and Part C claims—those filed after 31 December 1972. Part C claims were to be administered by the Secretary of Labor under certain provisions of the Longshoreman's and Harbor Workers' Compensation Act of 1927.[11] Payment of Part C claims was to be made by the responsible operator, or if no responsible operator could be found, from federal revenues.

In 1972, Congress passed the Black Lung Benefits Act[12] which amended the earlier legislation. In addition to extending coverage to surface miners and changing some of the eligibility criteria, the 1972 Act postponed Department of Labor jurisdiction to claims filed after 31 December 1973, established a transitional category for claims filed between 1 July 1973 and 31 December 1973, and required coal companies to carry insurance or to qualify for self-

[10] Pub.L.No. 91-173, 83 Stat. 742 (1969).

[11] 33 U.S.C. § 901 *et seq.*

[12] Pub.L. No. 92-3-3 [*sic*], 86 Stat. 153 (1972).

insurance. The Act also allowed the Secretary of HEW to promulgate regulations to reopen all pending or denied claims and review them under the new legislation. The Secretary established a set of liberal "interim" regulations that caused a surge in Part B approvals. Part B claims were decided without any individual employer liability. *See* Lopatto, "The Federal Black Lung Program: A 1983 Primer" 85 *W.Va.L.Rev.* 677 at 686 (1983). The DOL encountered much difficulty in finding "responsible operators" to pay Part C claims due to the changing structure of the coal industry. In spite of considerable expense and effort by the government, responsible operators were being identified in only twenty-five to thirty percent of the cases. *Id.* at 689-690.

In response to the expense resulting from the surge in approvals without a corresponding increase of responsible operators to pay the claims, Congress passed the Black Lung Benefits Reform Act of 1977[13] and the Black Lung Benefits Revenue Act of 1977.[14] These amendments established the Black Lung Disability Trust Fund to be financed by an excise tax on each ton of surface or underground mined coal. In addition, the fund was made liable for all valid Part C claims in which the miner's last covered employment ended before 1 January 1970. These 1978 amendments also contained liberal eligibility criteria that resulted in a relatively high approval rate.

Almost immediately, the Trust Fund became insolvent. The 1978 amendments also directed that all previously denied and pending cases be reviewed under the new criteria. This new review created a large backlog of cases and systemic backlog has continued. Congress amended the legislation again in 1981, raising the excise tax and

[13] Pub. L. No. 95-239, 92 Stat. 95 (1978).

[14] Pub. L. No. 95-227, 92 Stat. 11 (1978).

restricting eligibility criteria in an effort to make the Trust Fund solvent. The 1981 amendment has resulted in a sharply reduced approval rate for claims. DOL statistics show that for the period January 1982, through March 1988, the number of initial claims filed was 58,680, and the number of final approvals (after appeals to an Administrative Law Judge and the BRB) was 3,383—a total approval rate of 5.8 percent.[15]

V

Black Lung Claims Process and Attorney Fee Provisions

Without considering the detailed eligibility criteria and regulations promulgated under each of the amendments discussed in part V, the history of black lung legislation demonstrates that even the *filing* of a claim for benefits is complex. It often requires a lawyer to determine which benefit structure applies to a particular claim. When responsible operators are represented by lawyers of their choice, at a fee set by whatever agreement they make (there is no regulation of defense attorneys' fees), and the trust fund is represented by the Office of the Solicitor in the DOL, a claimant who appears without a lawyer is in for a baffling and frustrating experience. Black lung litigation has none of the homey, claimant-oriented ambiance that one finds in the Veterans' Administration.

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[15] *See* Brief of Amicus Curiae, Jane Moran, DOL statistics at 4, note 5. Also, a Government Accounting Office report confirms that the Office of Workers' Compensation which makes the initial determination of claims at the administrative level in the DOL approves only about 5% of claims made under the 1981 amendments. *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before the Employment and Housing Subcommittee of the House Committee on Government Operations,* 99th Cong., 1st Sess. at 55-56 (1985) (GAO Report HRD-85-19).

Furthermore, in black lung cases the legislation and regulations specifically contemplate representation by lawyers and, unlike the VA claim process in *Walters,* for payment of attorneys' fees. For Part B claims (filed before December 31, 1972), claimants are responsible for the attorneys' fees. For claims filed after December 31, 1973, either the responsible operator (if one can be identified) or the Trust Fund is liable for the attorneys' fees. But in either situation the fee must be approved under 20 C.F.R. §§ 725.365 and 755.366.

In our consideration of the constitutionality of the fee provisions, we must examine not only the words of the statute and regulations, but also the manner of their administration. In this regard we do not find that the statutory requirements assuring "reasonable" fees are unconstitutional on their face as a matter of principle; rather we find that the total regulatory scheme is unconstitutionally applied. As the U.S. Supreme Court stated in overturning a state compulsory work statute in *U.S. v. Reynolds,* 235 U.S. 133 (1914):

> If such state statutes, upon their face, *or in the manner of their administration,* have the effect to deny rights secured by the Federal Constitution or to nullify statutes passed in pursuance thereto, they must fail. [citations omitted, emphasis supplied]

235 U.S. at 149. In *Griffin v. Illinois,* 351 U.S. 12 (1956) the U.S. Supreme Court held unconstitutional a state law which, in effect, required a transcript to perfect a criminal appeal but did not provide a free transcript to indigents. The Court pointed out that:

> Dissenting opinions here argue that the Illinois Law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation.

351 U.S. at 17, note 11.

As we explained above, 20 C.F.R. § 725.366(a) provides that the claimant's lawyer should file a fee application with the deputy commissioner, the administrative law judge or the Benefits Review Board for the services performed before that individual or tribunal. The fee is then to be determined from the information provided in the application and in accordance with the criteria provided in 20 C.F.R. § 725.366(b). In addition, the Benefits Review Board has ruled that the contingent nature (i.e., risk of loss) of the litigation may be included as a criterion under the provision in part (b) that allows consideration of "any other information which may be relevant to the amount of fee requested." *Risden v. Director,* BRB No. 78-488, 11 BRBS 819 (1980).

Although 20 C.F.R. § 726.366(b) appears to provide for attorneys' fees that will fairly compensate competent counsel, thus guaranteeing claimants' due process rights, an examination of the factual record before us reveals that this is not the case. Numerous attorney affidavits filed in this case as well as testimony before the House of Representatives Subcommittee on Labor Standards establishes that the attorney fees policy of the DOL discourages lawyers from representing black lung claimants so that many claimants, with cases of at least arguable merit, are unable to find counsel to represent them.

VI

Actual Implementation of the DOL's Attorneys' Fee System

The DOL will not award any attorneys' fee until a "final" decision has been made in a case. *See* 33 U.S.C. § 928(a) and *Thompson v. Potashnick,* 812 F.2d 574 (9th Cir. 1987). Although a claimant may prevail before the Deputy Commissioner and Administrative Law Judge (assuming an appeal is taken at each stage) and his attorney files a fee petition that is approved at each stage, the fee will not be paid until after a final decision by the Benefits Review Board (BRB). If the BRB remands the case to the Administrative Law Judge, the attorney must wait even longer for his fee. The record reveals that lawyers wait for years, often five to ten years, before receiving any payment.[16] There is no provision in the law for payment of interest on attorneys' fees.[17] One affiant attorney states that he is currently owed more than $30,000 in fees that have been awarded but not paid. Brief of Amicus Curiae Jane Moran, affidavit of Robert F. Cohen, Jr. at 7. In a small, depressed West Virginia town $30,000 is a substantial amount of money for an individual practitioner. In the long run, as John Maynard Keynes once observed, we are all dead. In the short run, lawyers have offices to run, mortgages to pay and children to educate.

[16] A report by the Government Accounting Office, relying on DOL statistics, states that 78% of cases disposed of by the Office of Administrative Law Judges between October 1, 1983, and August 21, 1984 took more than two years to adjudicate. When time is added for the initial administrative determination as well as an appeal to the BRB, it is clear that it does, indeed, take years to resolve a claim. *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before the Employment and Housing Subcommittee of the House Committee on Government Operations,* 99th Cong., 1st Sess. at 41 (1985) (GAO Report HRD-85-19).

[17] Although the DOL seems cavalier about the fact that lawyers must wait for years to collect fees without also receiving interest on the fees, we note that the Internal Revenue Service is Rhadamanthine in its collection of interest when the U.S. government is a payee rather than a payor. In addition to any penalty that might be properly assessed, the IRS collects interest on any overdue or unpaid taxes, even if the taxpayer has been granted an extension of time in which to pay. *See* 26 U.S.C. § 6601, 26 CFR § 301.6601-1 *et seq.* We also note that a responsible operator must pay interest if it fails to pay benefits awarded either initially by the deputy commissioner, or on appeal. 30 U.S.C. § 934, 20 CFR § 725.608.

Another affiant attorney states that the DOL has an informal policy[18] of allowing a maximum hourly rate of $85.00 for proceedings before the Deputy Commissioner, and a maximum hourly rate of $125.00 for proceedings before the Office of Administrative Law Judges or BRB. *Id.*, affidavit of Frederick Muth at 3. This same affiant states that a typical case will average between two and eight years, depending on the length of appellate litigation, and that because of this factor and the low rate of compensation (in light of its contingent nature), fewer qualified attorneys are accepting black lung claims than are required to process existing meritorious claims. He also points out that ". . . it has become increasingly common to find instances of U.S. Department of Labor hearing dockets populated primarily with *pro se* claimants . . ." and that his law firm has been inundated with prospective clients who have been unsuccessful in their efforts to retain competent representation. *Id.* at 4.

Another affiant attorney, employed for five years by the United Mine Workers of America, who has handled black lung cases during all five years, and worked exclusively on black lung cases for two years, states that few attorneys are willing to represent black lung claimants due to the risk of no recovery (and, therefore, no fee). This affiant also points out that because a lawyer generally accepts the case before either parties' medical evidence is complete, the lawyer is usually unable to assess the merits of a black lung claim until after he agrees to represent the claimant. Furthermore, it is nearly impossible to handle a few cases on a *pro bono* basis because the complexity of black lung litigation requires a level of expertise that is consistent only

[18] The DOL does not have a formal policy establishing a maximum hourly rate. *Ashmore v. Director,* BRB No. 79-639, 3 BLR 1-374 (1981).

with a large number of cases due to the enormous investment of time necessary to learn the law and keep current with changes.[19]

In 1985, the House Subcommittee on Labor Standards[20] held several hearings in coal regions to study the problem of the systemic backlog of black lung cases. Two lawyers who testified before the Subcommittee in Wise, Virginia, who have been representing black lung claimants since the first law was enacted, provided ten specific examples where fees were approved, but no payment was received for at least two years, and in some cases, for five years or more.[21] Another lawyer testified that there are 26 cases in his office in which fees were awarded but not paid for more than three years.[22] Even if we assume that these examples are "exceptional" in some way, the very existence of "exceptional" cases in which lawyers are required to subsidize the operation of the federal government must have a chilling effect on lawyer willingness to enter the system.

Finally, one lawyer testified that many of his colleagues had ". . . stated unequivocally that they would not take black lung cases because of the delay in receiving the pay for their work as well as the possibility that they may receive no fee at all."[23] Virtually all of the lawyers who testified before this subcommittee stated that they rarely, if ever, took black lung cases due to the long delay before a

[19] *See* Appendix A.

[20] Subcommittee of the House Committee on Education and Labor.

[21] *Investigation of the Backlog in Black Lung cases: Hearings before the Subcomm. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong., 1st Sess. 82-83 and 88-89 (1985).

[22] *Id.* at 194.

[23] *Id.* at 188.

decision, the additional delay in having fees paid, and the uncompensated risk of receiving no payment, particularly in light of the significantly lower approval rate under the 1981 eligibility rules.

It is hardly surprising then, that most lawyers, at least most who have any choice, choose to handle cases that do not require a five year delay for fee payment. The two factors that currently keep most attorneys from accepting black lung cases are the long delay in payment, without any provision for interest, and the lack of premiums to offset the contingent nature of the work. This latter factor has become increasingly prominent as the approval rate has steadily declined following the enactment of the 1981 amendments. DOL statistics demonstrate an approval rate for claims decided under the 1981 law of 22.7% for claimants before the Administrative Law Judges, and an overall approval rate of 5.8%.[24] This approval rate is significantly smaller than that for VA claims,[25] and demonstrates not only the necessity of lawer representation, but the substantial risk that a lawyer will receive no fee at all for his work.

VII

Application of *Walters* Criteria to Black Lung Litigation

When the criteria set forth by the U.S. Supreme Court in *Walters* to assess the constitutionality of fee limitations are applied to black lung cases, it becomes apparent that the Fifth Amendment's due process clause requires that the provisions for awarding attorneys' fees in black lung cases must, in fact, allow claimants representation by competent counsel.

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[24] *See supra,* note 15.

[25] Of 800,000 VA claims in 1978, more than 400,000 were allowed at the initial level and approximately 14,400 more were allowed after appeals. *Walters,* 473 U.S. at 309.

When the Court in *Walters* examined the nature of the government interest in limiting fees in veterans' cases, it found that the purpose of the limitation was to avoid lawyers' needlessly sharing claimants' benefits. The Court found that VA procedures are designed to be non-adversarial, and that if lawyers become involved on a large scale a more complicated and adversarial process will evolve without any improvement in terms of rates of error over the current system. However, in black lung litigation, it is clear that Congress intended that lawyers be used by claimants because it specifically provides for lawyers, and for payment of a "reasonable" attorney's fee. 33 U.S.C. § 928. And although the VA benefits process is relatively simple and non-adversarial, the black lung process is both complex and adversarial.[26]

The government interest in requiring approval of attorneys' fees in black lung cases is to ensure that neither the responsible operator nor the Trust Fund will be overcharged. The prohibition against direct agreement between a claimant and his lawyer is to protect claimants from improvident agreements that needlessly deplete their benefits. *See Moore v. Califano,* 471 F.Supp. 146 at 149 (1979). Unfortunately, the result of these regulations has been to make lawyers almost entirely unavailable to claimants. Indeed, although the ordinary claimant is not called upon to share his award with a lawyer, under the current system the claimant seldom has an award to share.

This turns our attention, then, to the second factor the Court analyzed in *Walters,* namely, the risk of erroneous deprivation of benefits under the existing VA procedure, and the probable value of additional or substitute safeguards. Relying on the statistics before it in *Walters* (*supra,* note 8), which demonstrated that claimants with

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[26] See discussion, *supra,* at Sections IV and V.

lawyers are only marginally more successful in VA cases than claimants without lawyers, the Court found that allowing claimants free access to lawyers would not significantly increase the number of prevailing claimants. Factually, this is decidedly not the situation in black lung cases.

The black lung claims process is procedurally, factually and legally complex. Furthermore, at least in cases where a responsible operator is potentially liable for benefits, it is viciously adversarial.[27] Unfortunately, we do not have before us the kind of statistical evidence that the Court had in *Walters*. However, the Respondent's clients can probably be taken as representative of most claimants; they were all refused benefits before they retained Respondent who then won their cases.[28] Ironically, a responsible operator is free to retain lawyers to resist claims. Because benefits are expensive, operators often oppose claims vigorously.[29] In cases where the award will be paid by the

[27] Although the Office of Workers' Compensation in the Department of Labor (which is responsible for the initial decision of black lung claims) approves only about 5% of claims filed, responsible operators appeal more than 90% of these approvals to the Office of Administrative Law Judges. Of the 95% of the claims denied, applicants appeal about 40% to the OALJ. *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before the Employment and Housing Subcommittee of the House Committee on Government Operations,* 99th Cong., 1st Sess. at 55-56 (1985) (GAO Report HRD-85-19).

[28] Record at 34, 66-70, 82-83, 95, 111, 138-9, and 152.

[29] Brief of Amicus Curiae, Jane Moran, affidavit of Robert Cohen at 8-9, affidavit of Frederick Muth at 5-6. "The actuarial value of a 1982 claim by a living miner with a spouse is nearly $150,000 dollars." Lopatto, "The Federal Black Lung Program: A 1983 Primer," 85 *W.Va.L.Rev.* 677 (1983) at 686, citing actuarial chart in Black Lung Benefits Act Annual Report, U.S. Department of Labor 33 (Jan. 1981).

Trust Fund, the Fund is represented by lawyers from the DOL Office of the Solicitor. Finally, although the veterans' service organizations provide knowledgeable representatives to aid claimants for VA benefits, a fact that greatly impressed the Court in *Walters,* no such system of alternative representation exists to aid black lung claimants.[30] Therefore, lawyer representation is virtually essential to prevent erroneous deprivations of benefits for victims of black lung.

The third and final factor considered by the Court in *Walters* was the nature of the private interest at stake. The Court found that VA benefits are more akin to the social security benefits considered in *Matthews* than they are to the welfare benefits considered in *Goldberg.*[31] Because

[30] Although the United Mine Workers of America (UMWA) has provided substantial representation for claimants in the past, District 31 of the UMWA, one of three districts serving West Virginia, has ceased such representation due to lack of money. Brief of Amicus Curiae, Jane Moran, attached letter of January 26, 1987 from Eugene Claypole, John Darcus and James Slusser of UMWA.

[31] The District Court in the *Walters* case held that applicants for benefits, no less than persons already receiving them, have a "property" interest if the applicants meet the statutory criteria for benefits. The Supreme Court has thusfar held only that a recipient of benefits has a "property" interest in their continued receipt. Since at least one of the claimants in *Walters* alleged a diminution of benefits already being received, the Court did not decide whether a mere claimant has a "property" interest in his prospective benefits. 473 U.S. at 320, note 8. Respondent Triplett represented one claimant from whom the government sought repayment of an alleged overpayment of benefits. Record at 100-102. Because this client clearly had a vested property interest in these benefits, we need not rule on the nature of a claimant's property interest in prospective benefits, a question the Supreme Court has so far deferred. However, we here state our belief that a claimant who meets all the criteria making him eligible for benefits should not be deprived of due process safeguards simply because he is not already receiving benefits. Black lung benefits are not a form of government

black lung benefits are awarded only in cases of total disability or death,[32] they may well provide the only means of subsistence. This makes them similar to the welfare benefits ". . . upon which the recipients in *Goldberg* depended for their daily subsistence." *Walters,* 473 U.S. at 332-333.

Accordingly, we find that the DOL system of awarding attorneys' fees does, in fact, severely restrict claimants' ability to find competent lawyers to represent them, and, therefore, the system violates due process in accordance with the decision of the U.S. Supreme Court in *Walters*.

Alternatively, there is an independent basis for finding a violation of due process in a fee limitation scheme that effectively denies claimants the right to benefits granted by Congress. It is fundamentally unfair for the government to confer a right with one hand, and take it away with the other hand. As Chief Justice John Marshall said in *Marbury v. Madison,* 5 U.S. (1 Cranch) 49 (1803):

> "In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is awarded." [quoting Blackstone] . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of

largesse, but rather are *compensation* for which the miner has paid dearly, either with total disability or death. If due process is truly a flexible concept, as the U.S. Supreme Court has repeatedly held, there can be no justification for an inflexible rule that claimants have no property interest in benefits for which they *qualify* but which they do not yet receive.

[32] The statute has one exception that allows payment of benefits to eligible survivors of a miner who dies before March 1, 1978, and who was employed at least 25 years in coal mines prior to June 30, 1971, unless it is established that when the miner died, he was not *partially* or totally disabled due to black lung. 30 U.S.C. § 921(c)(5) 1981.

> men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

5 U.S. (1 Cranch) at 58-59.

Congress has conferred upon qualified claimants the right to receive black lung benefits. Congress has also prescribed the remedy (the claims process) to guarantee this right, an essential part of which is the right to counsel. It is, therefore, unconstitutional for the Department of Labor by its regulations to deny qualified claimants the procedural safeguards provided by Congress that are essential to vindicate the right to benefits also granted by Congress.

VIII

The Risk of Loss Problem

There are several possible ways to award attorneys' fees that take into account the risk of loss factor in black lung cases. Most directly, the law could provide for a contingent fee based on a set percentage of any lump sum awarded, as the Respondent contracted for in this case. In the alternative, a multiplier could be used to enhance the "normal" hourly fee to compensate for the risk of loss. The U.S. Supreme Court has recently examined the use of "contingency multipliers" in the context of fee-shifting statutes.

In *Pennsylvania v. Delaware Valley Citizens Council,* 483 U.S. __, 107 S.Ct. 3078 (1987), the Court reversed a U.S. District Court's use of a contingency multiplier to enhance an award of attorneys' fees to successful plaintiffs under the fee-shifting provisions of the Clean Air Act (42 U.S.C.S. § 7604(d)). Justice White, writing for a plurality, said "The issue before us is whether, when a plaintiff prevails, its attorney should or may be awarded separate compensation for assuming the risk of not being paid." 483

U.S. __, 107 S.Ct. at 3081. Although Justice O'Connor joined the plurality to make a majority, she limited her concurrence to the circumstances of the particular case because she concluded that Congress" . . . did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions such as the Clean Air Act . . ." *Id.* at 3089.

In addition to the mathematical difficulty of computing contingency multipliers, the Court pointed out that one of the strongest objections to them is that ". . . it penalizes the defendant with the strongest defense, and forces him to subsidize the plaintiff's attorney for bringing other unsuccessful actions against other defendants." *Id.* at 3085, citing Leubsdorf, "The Contingency Factor in Attorney Fee Awards," 90 *Yale L.J.* 473 at 488-491. The Court also noted that a contingency multiplier might encourage risky litigation because the less chance there is of prevailing, the higher the multiplier. *Id.* at 3086. However, Justice O'Connor, as well as the four dissenting Justices,[33] argued that this reasoning correctly suggests that awarding contingency enhancement based on the merits of a particular case may be undesirable, but the fact that it may be undesirable in a particular case does not, as a matter of principle, undercut the substantial justification for contingency enhancement in some types of cases. *Id.* at 3097 (Blackmun, J., dissenting).

The Court held that enhancement of a fee for the risk of loss in fee-shifting cases should be made only in exceptional cases when the risk of no recovery is clear from the outset of a case and when, without risk-enhancement, plaintiff ". . . would have faced substantial difficulties in finding counsel in the local or other relevant market." *Id.* at 3089. The Court concluded that these elements were not

[33] Justices Blackman, Brennan, Marshall and Stevens.

present in the case before it and held that the District Court's use of a multiplier in that case was improper.

The Court's decision in *Delaware Valley* does not preclude the use of a contingency multiplier in black lung cases. *Delaware Valley* applies to cases involving fee-shifting statutes that are different from the attorney fee provisions in black lung cases. Most importantly, fee-shifting statutes do not affect the ability of plaintiffs to enter into whatever contracts they desire with their lawyers and thus increase the lawyer's ultimate fee beyond the amount awarded under a fee-shifting statute. In black lung cases, however, no contract between a claimant and his lawyer is allowed, so lawyers are forced to accept the risk of receiving no fee at all in the large majority of cases.

Furthermore, in black lung cases, when either the claimant or the Trust Fund must pay attorneys' fees, there is no danger of losing defendants' compensating plaintiffs' lawyers for not prevailing against other defendants in other cases—the factor that so disturbed the Court in *Delaware Valley*. Also, it is clear from the evidence before us that the administration of the black lung attorneys' fee provisions has, in fact, caused claimants to face substantial difficulties in finding counsel willing to represent them, a factor specifically required by the Court in *Delaware Valley* for enhancement of fees in fee-shifting cases. *Id.*

IX

It is clear from the evidence before us that most lawyers are unwilling to represent black lung claimants because of the inadequate fees awarded by the DOL. On the one hand, it takes a matter of years to litigate a case, and often an additional two years after a successful conclusion for a lawyer to be paid his fee. When there is no provision for interest, and a lawyer faces overhead costs that cannot be postponed, any lawyer will turn his attention to paying

cases. In addition, because there is no systematic enhancement of fees to compensate lawyers for the risk of loss—a very substantial risk in cases decided under the 1981 law—most lawyers who have a choice will prefer contingent fee cases that provide premiums for risk.

We do not suggest what would be the best system for awarding attorneys' fees in black lung cases. That decision is properly left to Congress and the DOL promulgating regulations pursuant to congressional legislation within the bounds set by the *Constitution*. We do, however, find that the system as currently administered denies claimants for black lung benefits property without due process of law by severely restricting their right to obtain representation by competent counsel in the highly adversarial process of black lung litigation.

The respondent, George Triplett, was forced into making a tragic choice between conflicting duties. He either had to refuse to represent deserving, disabled miners, run the risk of bankrupting his practice, or violate the DOL regulations. The U.S. Supreme Court stated in *Ex Parte Siebold,* 100 U.S. 371 (1879) that:

> An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.

100 U.S. at 376-377. *Accord, Norton* v. *Shelby County,* 118 U.S. 425 (1885); 16 Am.Jur.2d § 256.[34]

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[34] Generally we do not believe it is sound practice to cite Am.Jur. because the treatise often states the majority and minority positions on a given issue with equal force. However, we deviate from our general rule here because with regard to the effect of unconstitutional laws, it appears that the weight of authority for the proposition quoted is so overwhelming that there is no minority position.

16 Am.Jur.2d § 256, in relevant part, reads:

Six black lung clients of Respondent testified at the ethics hearing before the Committee. One client was dissatisfied and said that he *never* agreed to pay Mr. Triplett anything for his work, although the client testified that the signature of his name on a 25 percent contingent fee contract did appear to be his. Record at 31. The Respondent testified that he explained the fee agreement fully to this client (and all of his other clients) before the client signed it. Record at 144. The other five clients testified that they agreed to pay Mr. Triplett 25 percent of any past benefits they were awarded, and that they were satisfied with Mr. Triplett's work and felt he deserved to be paid the 25 percent fee. The Respondent put the fee money he received into interest-bearing escrow accounts in the vain hope that the regulations would be changed to allow contingent fee agreements. We do not believe that this constitutes clear evidence of professional misconduct by Respondent.

> The general rule is that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted. No repeal of such an enactment is necessary.
>
> Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. A contract which rests on an unconstitutional statute creates no obligation to be impaired by subsequent legislation.
>
> No one is bound to obey an unconstitutional law and no courts are bound to enforce it. Persons convicted and fined under a statute subsequently held unconstitutional may recover the fines paid. [Footnotes omitted]

The Committee on Legal Ethics has the burden to prove by full, preponderating and clear evidence that Respondent is guilty of professional misconduct under DR 1-102(A)(4), (5) and (6) of the West Virginia *Code of Professional Responsibility*. Accordingly, we find the Respondent, George Triplett, not guilty of any ethical violation for resisting an administrative system that clearly and unambiguously violates the Fifth Amendment to the *Constitution of the United States.*

Because our decision involves an important question of federal law, we grant leave to the Department of Labor to intervene as a party litigant, either for the purpose of filing a petition for rehearing before this Court, or for the purpose of prosecuting an appeal to the Supreme Court of the United States.

Attorney Exonerated.

APPENDIX A

AFFIDAVIT SUPPLIED BY AMICUS, JANE MORAN

I, THOMAS H. ZERBE, being first duly sworn, states as follows:

I am an attorney employed with District 17, United Mine Workers of America in Charleston, West Virginia. I have been employed by District 17, U.M.W.A. for five (5) years. During all my five year tenure, I have either handled federal black lung claims or supervised attorneys who handled federal black lung claims. For two (2) years, my work was almost exclusively handling federal black [lung] claims. Currently, I am Director of Benefits, and as part of that job I supervise the black lung attorney as well as handle some claims myself.

I am familiar with virtually every attorney in West Virginia who represents clients in federal black [lung] cases. I have spoken personally with many of these attorneys about the economics of handling federal black lung cases. I have also spoken with clients and administrative law judges about the problem of claimants, who are not members of the United Mine Workers of America, in getting attorneys to represent them in federal black [lung] claims.

The number of attorneys willing to accept federal black lung claims has always been limited, but it has declined even more in recent years. Of those attorneys who do not accept federal black lung cases, many have a policy of accepting them only as a service to clients, whom they represent on other matters.

The reason attorneys are unwilling to represent claimant's in federal black lung claims is simple economics. The cases are difficult to win and the fee awards are too low considering the contingent nature of a fee. The federal statute prohibits the attorney from charging the client. If

the attorney wins the case, he submits a fee petition based on the number of hours that he has in the claim to the administrative law judge, who awards attorney's fees against the defendant. Most of the administrative law judges award an hourly rate that would be generous were it not a contingent fee, but it is still not enough considering the contingent nature of the fee and the very low win rate. The win rate for claimants before the Department of Labor administrative law judge[s] deciding claims filed after January 1, 1982, under the post-amendment law is only 22[.]7 percent.

Since the attorney generally accepts the case before either parties' [sic] medical evidence is fully developed, the attorney is often unable to evaluate the merits of the case at the time he accepts the client. This compounds the attorney's risk. It is impossible for attorneys to handle only a few cases *pro bono* because it is necesssary to handle a substantial number of cases in order to justify the time the attorney needs to invest to learn and keep current in this complex law.

By prohibiting attorneys from taking a percentage of the back award, the statute was designed to protect coal miners and their widows from gouging attorneys. Unfortunately, the effect has been to make lawyers unavailable to the miners and widows whom the law was designed to protect. The only way the system will work is to drastically increase the fee awards. [Signature and acknowledgements omitted]

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 18396

COMMITTEE ON LEGAL ETHICS OF
THE WEST VIRGINIA STATE BAR

v.

GEORGE R. TRIPLETT

MILLER, Justice, dissenting:

We have traditionally stated that the scope of appellate review is confined to those issues decided at the trial level except where the lower court lacked jurisdiction to act in the first instance. This has coalesced into the language reflected in Syllabus Point 2 of *Duquesne Light Co.* v. *State Tax Dep't*, __ W. Va. __, 327 S.E.2d 683 (1984): " 'This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.' Syllabus Point 2, *Sands* v. *Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958)."

Here the question of the constitutionality of the black lung fee statute could have been raised below, but it was not. Because the issue was not raised below, there is no factual record developed. The ex parte affidavits filed as attachments to the amicus brief of Jane Moran are, to my mind, woefully inadequate to predicate the factual conclusion reached by the majority.

Furthermore, the majority's reliance on *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 87 L. Ed. 2d 220, 105 S. Ct. 3180 (1985), is completely misplaced. I find, contrary to the majority's statement, slip op. at 7, that *Walters* does *not* set "clear, bright line standards." What *Walters* did was to uphold the ten dollar fee statutorily authorized for a lawyer or agent who represented a veteran who was seeking veteran's benefits.

It did so chiefly because it began with this fundamental legal proposition:

> "Judging the constitutionality of an Act of Congress is properly considered ' "the gravest and most delicate duty that this Court is called upon to perform." ' *Rostker* v. *Goldberg,* 453 U.S. 57, 64 [69 L. Ed. 2d 478, 486, 101 S. Ct. 2646, 2651] (quoting *Blodgett* v. *Holden,* 275 U.S. 142, 148, 276 U.S. 594, 72 L. Ed. 206, 48 S. Ct. 105 (1927) (Holmes, J.)), and we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government." 473 U.S. at 319, 87 L. Ed. 2d 232, 105 S. Ct. at 3188.

The Supreme Court's bottom line in *Walters* was that there was no factual showing that the fee system deprived veterans of due process under *Mathews* v. *Eldridge,* 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976):

> "We accordingly conclude that under the *Mathews* v. *Eldridge* analysis great weight must be accorded to the Government interest at stake here. The flexibility of our approach in due process cases is intended in part to allow room for other forms of dispute resolution; with respect to the individual interests at stake here, legislatures are to be allowed considerable leeway to formulate such processes without being forced to conform to a rigid constitutional code of procedural necessities. *See Parham* v. *J.R.*, 422 U.S., at 608, n.16, 61 L. Ed. 2d 101, 99 S. Ct. 2493. It would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law. We have no hesitation in deciding that no such showing was made out on the record before the District Court." 473 U.S. at 326, 87 L. Ed. 2d at 236, 105 S. Ct. at 3192.[1]

In this case, I simply do not believe that such an "extradorinarily strong showing" has been made based on the generalized ex parte affidavits filed with this Court.[2] Here the main complaint by the several affiants is not so much the amount of the fee received, but the delay in receiving fees because of the backlog of black lung cases. I know of no court which has seized on this fact to void a fee system.

Finally, there appears to me to be a lamentable lack of due process extended to the Department of Labor, which now finds its attorney's fee mechanism declared un-

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[1] *Mathews* v. *Eldridge,* 424 U.S. at 355, 47 L. Ed. 2d at 33, 96 S. Ct. at 903, formulated this set of factors to determine the appropriate due process requirements:

> "[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, or additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

[2] In *Walters,* the Supreme Court was confronted with similar generalized assertions about the unfairness of the administrative procedures in the Veteran's Administration and made this telling comment:

> "Anecdotal evidence such as this may well be sufficient to support a finding by a judge or jury in litigation between private parties that a particular fact did or did not exist. But when we deal with a massive benefits program provided by Congress in which 800,000 claims per year are decided by 58 regional offices, and 36,000 claims are appealed to the BVA, it is simply not the sort of evidence that will permit a conclusion that the entire system is operated contrary to its governing regulations." 473 U.S. at 324 n.11, 87 L. Ed. 2d at 235 n.11, 105 S. Ct. 3191 n.11.

constitutional without ever having the opportunity to be heard before this Court announced its decision.

I am authorized to state that Justice McHugh joins me in this dissent.

APPENDIX B

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 18396

COMMITTEE ON LEGAL ETHICS OF
THE WEST VIRGINIA STATE BAR

v.

GEORGE R. TRIPLETT

[Filed Dec. 20, 1988]

NEELY, Justice:

On a former day, to-wit the 14th day of December 1988, came the United States Department of Labor by its Solicitor of Labor, George R. Salem, Esq., and pursuant to leave heretofore granted, intervened to petition the court to grant a rehearing in this matter. Intervenor, the United States Department of Labor, also petitioned to supplement the record by the inclusion of the following: Affidavit of James L. De Marce, Associate Director, Division of Coal Mine Workers' Compensation; Affidavit of Jane G. Denney; Affidavit of Nahum Litt; Department of Labor Letters CM-1000a and CM-1000b; and the awards and/or decisions in the cases of Charles Ice, Raymond Corley, Thelma Beam, Jacob B. Godwin, Peter Guire, Anna J. Poling, Euna Ball, Harry Hedrick, William F. Scott, and Inobelle Stevenson. All of the aforesaid

material is hereby ordered filed and made a part of the record in this case for all purposes.

The court has carefully considered the supplemental material filed by the Department of Labor in support of its petition for rehearing, and has also carefully considered the factual representations and legal arguments set forth in intervenor's brief in support of its petition for rehearing. The court concludes that the arguments advanced by the Department of Labor were maturely considered upon the initial submission of this case and are adequately addressed in the court's original opinion.

Intervenor seeks to overcome the court's conclusion that lawyers are paid inadequately and too slowly under the current Department of Labor fee limitation system through the following representation:

> "Nor is it reasonable to conclude from the record that respondent would have experienced inordinate delays in having his fee petitions approved. In the one instance where he submitted a fee petition after obtaining a Trust Fund award at the deputy commissioner level, he received payment, at the requested rate and for more hours than he documented (but less than he requested), approximately eight months after his application. . . In the one instance where he applied to an ALJ for a fee award in a responsible operator case, he received an award, despite the operator's objections, within 11 months of the date of his application, and within 7 months of the ALJ's receipt of it."

Intervenor's Brief at p. 7. We find that an eight month and eleven month delay in fee payments simply support the findings of fact and conclusions of law set forth in the court's original opinion.

Intervenor defends the constitutionality of the fee system as applied by arguing that a different system would

be more expensive *both* in terms of the cost of lawyers' fees and in terms of the added burden on the system of affording claimants a fair opportunity to be heard. In this regard intervenor asserts:

> "Another legitimate government interest is to ensure that responsible operators and the Trust Fund will not be overcharged. The Court recognized (slip op. 23) but gave very little weight to this interest. This interest is substantial because of operators' constitutional rights (*Levins*, 724 F.2d at 9) and because the Trust Fund, which is financed by the coal industry (26 U.S.C. (& Supp. IV) 4121(a), 9501), is currently almost $3 billion in debt to the United States Treasury. See Affidavit of James L. De Marce, *supra*. Higher attorney's fees could increase this debt, as could the expense of more prolonged claims processing from attorney participation in cases (cf. *Walters*, 473 U.S. at 324-326), the latter by requiring the hiring of more personnel at the ALJ and Benefits Review Board levels to prevent a rebuilding of a case backlog. . . Such increased costs to the Fund; and thereby to the government in the form of increased debt, must be given serious consideration, as the Court admonished in *Mathews*, 424 U.S. at 348, even though they are not controlling. At some point, the costs to government and the public (including the resulting need to cut limited resources elsewhere) outweigh the benefit to the individual of the additional safeguard."

Intervenor's brief at pp. 16, 17. We infer that the Solicitor is arguing that the current fee limitation system, which discourages adequate representation, is justified on the grounds that if claimants had access to lawyers, claimants would prevail more often and raise the costs of the black

lung program. We do not find that Congress's purpose in authorizing limitations on fees was to reduce the number of eligible claimants who would prevail and receive benefits.

Intervenor makes explicit reference to statistics compiled specially for its rehearing petition in this case. The Department of Labor's own specially compiled statistics (the Solicitor's best shot) conclusively demonstrate that at the administrative law judge level, claimants represented by counsel have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se*. In this regard the Solicitor says:

> "Statistics compiled by the Department in a sample of recent cases resulting in awards or denials of benefits show that claimants are represented at the ALJ level in 92% of the cases, and prevail 29% of the time when represented. While the statistics also show that the small minority of *pro se* claimants have an 11.6% success rate, this difference certainly is not so significant as to establish that lawyers are indispensable in the BLBA claims process—particularly in light of the 92% representation rate."

Intervenor's brief at p. 23. We find that the Solicitor has simply reinforced with more elaborate statistics the conclusion that we reached in the original opinion—namely, that a claimant's chance of prevailing when he is represented by counsel is substantially higher than when he appears *pro se*.

When claimants represented by counsel prevail 2.5 times as frequently [as] *pro se* claimants, we cannot agree with the Solicitor that the difference is not constitutionally significant for due process purposes. The Solicitor argues that:

> "Assuming, without conceding, that applicants have a property interest under the due process clause, their interest is only the intangible interest in receiving fair consideration of their applications. They risk losing only a chance at benefits rather than the benefits themselves."

Intervenor's brief at p. 19. However, we stand by our original conclusions: We believe that "receiving fair consideration" is exactly the type of abstract entitlement that due process principles are designed to protect and enchance.

Finally, we have carefully considered the following argument of the Solicitor:

> "Moreover, as in *Walters*, 473 U.S. at 326, there is also a risk that increased attorney representation may exacerbate the adversarial nature of the black lung adjudicatory system, resulting in an [sic] increased administrative costs to the government and delay to deserving claimants."

Intervenor's brief at p. 23. Because responsible operators may be as adversarial as they wish in the defense of claims, and may spend as much money as they choose on lawyers' fees, we have a hard time understanding how claimant representation by lawyers is liable to "exacerbate the adversarial nature of the black lung adjudicatory system. . . ." Although we know the irony is unintentional, we cannot help but infer that the Solicitor is arguing that if claimants have full and fair access to lawyers, they might do reprehensibly adversarial things such as introduce competent evidence, study the claims regulations, vigorously prosecute cases, and perhaps even appeal to the courts.

Accordingly, it is Adjudged, Ordered and Decreed that Intervenor's petition for rehearing be, and the same hereby is denied. And it is further Ordered that this Order be printed as an addendum to the original opinion.

APPENDIX C

BEFORE THE COMMITTEE ON LEGAL ETHICS OF
THE WEST VIRGINIA STATE BAR

I.D. #86-056

IN RE: GEORGE R. TRIPLETT, A MEMBER OF
THE WEST VIRGINIA STATE BAR

FULL HEARING PANEL FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION CONCERNING DISCIPLINE

This matter came on for deliberation by the Full Hearing Panel of the Committee on Legal Ethics of The West Virginia State Bar at its meeting held on March 26, 1988, in Charleston, West Virginia. After review of the Subcommittee Report submitted by the Hearing Subcommittee which had been assigned to the hearing of the matter, the Hearing Panel entered upon deliberations of the matter and, after consideration of the record in the Subcommittee Report, voted unanimously, a quorum being present, to make the following Findings of Fact, Conclusions of Law, and Recommendation Concerning Discipline:

FINDINGS OF FACT

The Hearing Panel has carefully reviewed the outline of evidence presented by the Hearing Subcommittee as found on pages 2 through 5 of the Hearing Subcommittee Report signed by the members of the Hearing Subcommittee.

After review of the evidence and discussion of the matter, the Full Hearing Panel further determined that the three Findings of Fact (with all subparagraphs of paragraph three) with regard to the allegations against Attorney George R. Triplett in I.D. 86-056 as set forth on pages 2 through 5 of the Hearing Subcommittee Report are supported by full and clear preponderance of the evidence and are adopted as Findings of Fact by the Full Hearing Panel of the Committee on Legal Ethics.

CONCLUSIONS OF LAW

After due consideration of the foregoing Findings of Fact, the Full Hearing Panel of the Committee on Legal Ethics determined that the Conclusions of Law listed on pages 6 and 7 of the Hearing Subcommittee Report were appropriate in this matter and voted to adopt the Conclusions of Law recited in the Hearing Subcommittee Report as those of the Full Hearing Panel of the Committee on Legal Ethics.

RECOMMENDATION OF DISCIPLINE

After due deliberation of the Findings of Fact, the Conclusions of Law and the Recommendation of Discipline, as contained on page 7 of the Hearing Subcommittee Report, the Full Hearing Panel determined that it will present a formal recommendation to the Supreme Court of Appeals of the State of West Virginia that Respondent George R. Triplett be suspended from the practice of law for a period of six months by the Supreme Court of Ap-

peals and that he be required to pay the costs incident to the investigation and prosecution of this matter.

HEARING PANEL, COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR

ARTHUR M. RECHT

Arthur M. Recht, Chairman

DATE: April 3 1988

BEFORE THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR

I.D. #86-056

IN RE: GEORGE R. TRIPLETT, A MEMBER OF THE WEST VIRGINIA STATE BAR

SUBCOMMITTEE REPORT

The matter is before a Hearing Subcommittee upon a statement of charges filed by the Committee on Legal Ethics of the West Virginia State Bar against George R. Triplett, (herein "Respondent").

The hearing upon the Statement of Charges was conducted on August 3, 1987, before a Subcommittee composed of John C. Skinner, Jr., Chairman, David Harris and Warren A. Thornhill, III.

The written notice containing a plain statement of the charges against the Respondent was served and executed in accordance with Article 6, Sections 4 and 39 of the West Virginia State Bar By-Laws.

The following constitutes the Subcommittee Report containing a State[ment] of the Findings of Facts, Conclusions of Law and Recommendation as to the warranted disciplinary procedure in accordance with Article 6, Section 17 of the West Virginia State Bar By-Laws.

FINDINGS OF FACT

(1) Respondent is a licensed member of the West Virginia State Bar.

(2) The venue of these proceedings was held in Randolph County where Respondent has his principal office in accordance with Article 6, Section 14 of the West Virginia State Bar By-Laws and there was no challenge to the composition of the Subcommittee.

(3) That both direct and circumstantial evidence in this case establishes by full, preponderating, clear and convincing evidence that:

(a) Beginning in approximately 1978, Respondent represented various clients with respect to their claims for compensation under the Black Lung Benefits Act, 30 U.S.C. Sec. 901, et seq.

(b) On February 18, 1980, Respondent wrote to Harry L. Gayer, Deputy Commissioner of the U.S. Department of Labor, requesting that payment of an award to his client, Andrew M. DeMotto, be made directly to the client and stated that Respondent would not file a Form CM-972 for attorneys' fees from the Department of Labor. Mr. Gayer responded, in a letter dated April 8, 1980, that the Department of Labor would reimburse Mr. DeMotto in the amount previously withheld for attorneys' fees with the understanding by all parties that any fee paid in the case must first be approved by the Department in accordance with Section 725.365 of the regulations. On April 15, 1980, Respondent submitted a Form CM-972 (Petition for attorney fees) for payment of 42 hours expended at a rate of $60.00 per hour for a total of $2,250.00. However, the itemized list of time expended actually totaled twenty-two hours. On January 21, 1981, the acting Deputy Commissioner approved a fee award of $1,620.00, which represented 27 hours of legal services at the rate of $60.00 per hour. The amended award of benefits disallowed 15 additional hours because those hours were not reflected on the fee application form. Respondent received from Mr. DeMotto not less than $2,535.00 in legal fees for representation in the Black Lung Benefits case.

(c) On June 13, 1979, Respondent filed an application for approval of a representative's fee with the United States Department of Labor on behalf of his client, Charles G. Hillyard, which stated "No Applications for fee." Respondent certified that the information provided on the application was true and correct to the best of his knowledge and belief. On August 16, 1979, Respondent wrote to Ms. Luckie Kee, a claims examiner for the United States Department of Labor, that he did not plan to submit a fee application for his representation of Mrs. Thelma Beam. *On September 3, 1980, Respondent wrote to Dennis Allard, a claims examiner for the U.S. Department of Labor, that he would not submit a claim for legal fees on behalf of Letha Roberts.* On September 3, 1980, Respondent wrote to Mr. Edith Taylor, a claims examiner for the U.S. Department of Labor, that he would not submit a claim for legal services on behalf of Cosimo Vallelonga. On December 10, 1980, Respondent wrote to Ms. Taylor again, requesting that the $700.00 which the Department of Labor was withholding from Mr. Vallelonga's benefit award for attorney's fees be promptly paid to Mr. Vallelonga because Respondent would not be submitting a claim for legal services.

(d) Without making any application for fees as required by 20 C.F.R. Section 725.365 and 725.366 and 33 U.S.C. Section 928(e), Respondent requested and received fees for representation in Black Lung Benefit cases in the approximate amounts listed below from the following clients:

1. Charles Hillyard	$ 2,556.00
2. Thelma Beam	$ 3,571.18
3. Letha Roberts	$ 2,499.50
4. Cosimo Vallelonga	$ 6,300.00
5. Mary Bertelli	$ 995.41
6. Julie D. Rossi	$ 1,433.00
7. Anna J. Poling	$ 5,400.00
8. Peter G. Guire	$ 6,564.30

9. Jacob B. Godwin	$13,533.50
10. Charles Ice	$ 5,958.00
11. Raymond Corely	$ 3,500.00
12. William Scott	$ 2,000.00
13. Euna Ball	$ 2,100.00
14. Inobell Stevenson	$ 2,451.00
15. Harry Hedrick	$ 2,367.50

(e) On September 19, 1986, Respondent signed an Agreement for Pre-Trial Diversion which deferred prosecution by the United States Attorney for the Northern District of West Virginia for alleged offenses in violation of 18 U.S.C. Section 1341 and 1505 upon certain conditions, including complete restitution with interest for all legal fees collected in the amounts listed in paragraphs (b) and (d) set forth above and an agreement by Respondent not to represent persons in the prosecution in [sic] the Black Lung Benefit claims. Respondent has made such restitution.

(f) The Respondent has been the Circuit Judge of Randolph County, West Virginia, and had approved the payment of fees to attorneys for services provided for indigents charged with crimes which forms required itemized statements for the time spent both in and out of court. The Respondent as Circuit Judge had approved infants' settlements of personal injury claims which allow attorney fees.

As early as February of 1978 Respondent had drafted a fee petition in Mary Bertelli's case.

(g) The amounts taken in fees described in (d) above equaled approximately 25% of the lump sum award. Most of the recipients had executed a contingent fee contract with Respondent providing for Respondent to receive 25% of the recovery although none of the contracts admitted into evidence was executed by the Respondent.

(h) The various clients enumerated in (d) paid the Respondent the sums set forth and Respondent put the sums in bank accounts in his name as agent or trustee or attorney on escrow for the individual claimants. In 1983, the Respondent spent some of the escrowed funds for his own use.

(i) The Respondent made full restitution to all of his Black Lung clients for all fees charged plus interest at the going rate. Respondent cooperated fully with the Federal authorities and cooperated fully with the State Bar. Respondent enjoys a good reputation and has not been previously charged with an ethics violation.

(j) The Respondent appears to enjoys a good reputation among his clients and in the community as being a hard worker and having good character.

CONCLUSIONS OF LAW

The Respondent had filed fee petitions very early in his representation of Black Lung claimants. The fact that he thought it necessary to escrow the 25% contingent fees he charged Black Lung claimants manifests a clear awareness on his part that the failure to secure fee approval was wrong. The vague references to the possibility that the law might be changed to legitimatize what he had done does not stand up in the cold light of day. The designation by Jacob B. Godwin of Respondent (S2), the letter from Respondent to Mr. Gayer (S3) that he would not file a petition for attorney fees for DeMotto, the response to Respondent from Mr. Gayer (S3) ". . . that any fee to be paid in this case must first be approved by the Department of Labor in accordance with Section 725.365 of the regulations.", the January 21, 1981, letter from the Labor Department to Mr. DeMotte [sic] with a copy to Respondent allowing a fee of $1,620.00 and prov[id]e that "Pay-

ment of any amount greater or lesser than that approved shall be invalid.", the August 16, 1979, letter from Respondent to Luckie Kee (S4) that he did not plan to submit a fee application in Thelma Beam's claim, the award for Cosimo Valleglonga (S5), the December 10, 1980, letter from Respondent to Edith Taylor that no fee petition would be made for Vallelonga, the application for fees for Charles H. Hillyard (S6) as well as the Award of Benefits, Award of Benefits for Paul Roberts (S8), the Award of Benefits for Julie Rossi (S9), the Award of Benefits for Mary Bertelli (S10) are all strong evidence of the knowledge of Respondent that the way to have a fee paid for his successful representation of his Black Lung clients was to file a petition for fees as provided by Section 725.365 of the Regulations. His failure to abide by the regulation make[s] him guilty of violation of DR 1-102(A)(4), (5) and (6) of the Code of Professional Responsibility which provide that a lawyer should not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
(5) Engage in conduct that is prejudicial to the administration of justice.
(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

The Subcommittee concludes that Respondent is guilty of violations charged but that the cooperation of the Respondent, his good character and reputation together with his previously unblemished record are mitigating factors.

RECOMMENDATION

The Subcommittee recommends that Respondent should be suspended from the practice of law for a period

of six (6) months and that he should be required to pay the costs of this matter.

Dated this 24[th] day of March, 1988.

JOHN C. SKINNER, JR.
John C. Skinner, Jr.

DAVID HARRIS
David Harris

WARREN A. THORNHILL, III
Warren A. Thornhill, III

APPENDIX D

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 18396

COMMITTEE ON LEGAL ETHICS OF
THE WEST VIRGINIA STATE BAR, COMPLAINANT

v.

GEORGE R. TRIPLETT A MEMBER OF THE WEST
VIRGINIA STATE BAR, RESPONDENT

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 21st day of December, 1988, the following order was made and entered:

The Court having maturely considered the petition for rehearing and reargument filed in the above-captioned case is of opinion to, and doth hereby deny the prayer of the petitioner and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: ANCEL G. RAMEY
Clerk, Supreme Court of Appeals

APPENDIX E

Black Lung Benefits Act, 30 U.S.C. 932

§ 932. Failure to meet workmen's compensation requirements

(a) Benefits; applicability of Longshore and Harbor Workers' Compensation Act; promulgation of regulations

Subject to section 28(h)(1) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, during any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927) as amended [33 U.S.C. 901 et seq.], as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) [33 U.S.C. 901, 902, 903, 904, 908, 909, 910, 912, 913, 929, 930, 931, 932, 933, 937, 938, 941, 943, 944, 945, 946, 947, 948, 948a, 949, 950], shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of section 9501(d) of title 26), be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, or with respect to entitlements established in paragraph (5) of section 921(c) of this title. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment of benefits by such operator to persons entitled

thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928

§ 928. Fees for services

(a) Attorney's fee; successful prosecution of claim

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney f the claimant in a lump sum after the compensation ord becomes final.

(b) Attorney's fee; successful prosecution for additional compensation; independent medical evaluation of disability controversy; restriction of other assessments

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to

accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Secretary, as authorized in section 907(e) of this title and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

(c) Approval; payment; lien

In all cases fees for attorneys representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the Board or any court for review of any action, award, order, or decision, the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant. An approved at-

torney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board, or court shall fix in the award approving the fee, such lien and manner of payment.

(d) Costs; witnesses' fees and mileage; prohibition against diminution of compensation to claimant

In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing at the instance of claimant. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the hearing officer, the Board, or the court, as the case may be. The amounts awarded against an employer or carrier as attorney's fees, costs, fees and mileage for witnesses shall not in any respect affect or diminish the compensation payable under this chapter.

(e) Unapproved fees; solicitation; penalty

Any person who receives any fees, other consideration, or any gratuity on account of services rendered as a representative of a claimant, unless such consideration or gratuity is approved by the deputy commissioner, Board, or court, or who makes it a business to solicit employment for a lawyer, or for himself in respect of any claim or award for compensation, shall upon conviction thereof, for each offense be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

Department of Labor regulations: 20 C.F.R. 725.365-725.367

§ 725.365 Approval of representative's fees; lien against benefits.

No fee charged for representation services rendered to a claimant with respect to any claim under this part shall be valid unless approved under this subpart. No contract or prior agreement for a fee shall be valid. In cases where the obligation to pay the attorney's fee is upon the claimant, the amount of the fee awarded may be made a lien upon the benefits due under an award and the adjudication officer shall fix, in the award approving the fee, such lien and the manner of payment of the fee. Any representative who is not an attorney may be awarded a fee for services under this subpart, except that no lien may be imposed with respect to such representative's fee.

§ 725.366 Fees for representatives.

(a) A representative seeking a fee for services performed on behalf of a claimant shall make application therefor to the deputy commissioner, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed. The application shall be filed and served upon the claimant and all other parties within the time limits allowed by the deputy commissioner, administrative law judge, or appropriate appellate tribunal. The application shall be supported by a complete statement of the extent and character of the necessary work done, and shall indicate the professional status (e.g., attorney, paralegal, law clerk, lay representative or clerical) of the person performing such work, and the customary billing rate for each such person. The application shall also include a listing of reasonable unreimbursed expenses, including those for travel, incurred by the representative or an employee of a represen-

tative in establishing the claimant's case. Any fee requested under this paragraph shall also contain a description of any fee requested, charged, or received for services rendered to the claimant before any State or Federal court or agency in connection with a related matter.

(b) Any fee approved under paragraph (a) of this section shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested. No fee approved shall include payment for time spent in preparation of a fee application. No fee shall be approved for work done on claims filed between December 30, 1969, and June 30, 1973, under Part B of Title IV of the Act, except for services rendered on behalf of the claimant in regard to the review of the claim under section 435 of the Act and Part 727 of this subchapter.

(c) In awarding a fee, the appropriate adjudication officer shall consider, and shall add to the fee, the amount of reasonable and unreimbursed expenses incurred in establishing the claimant's case. Reimbursement for travel expenses incurred by an attorney shall be determined in accordance with the provisions of § 725.459(a). No reimbursement shall be permitted for expenses incurred in obtaining medical or other evidence which has previously been submitted to the Office in connection with the claim.

(d) Upon receipt of a request for approval of a fee, such request shall be reviewed and evaluated by the appropriate adjudication officer and a fee award issued. Any party may request reconsideration of a fee awarded by the adjudication officer. A revised or modified fee award may then be issued, if appropriate.

(e) Each request for reconsideration or review of a fee award shall be in writing and shall contain supporting statements or information pertinent to any increase or decrease requested. If a fee awarded by a deputy commissioner is disputed, such award shall be appealable directly to the Benefits Review Board. In such a fee dispute case, the record before the Board shall consist of the order of the deputy commissioner awarding or denying the fee, the application for a fee, any written statement in opposition to the fee and the documentary evidence contained in the file which verifies or refutes any item claimed in the fee application.

§ 725.367 Payment of a claimant's attorney's fee by responsible operator.

(a) If an operator declines to pay any benefits on or before the 30th day after receiving written notice of its liability for a claim on the ground that there is no liability for benefits within the provisions of the Act, and the person seeking benefits shall thereafter have utilized the services of an attorney in the successful prosecution of the claim, there shall be awarded, in addition to the award of benefits, in an order, a reasonable attorney's fee against the operator or carrier in an amount approved by the deputy commissioner, administrative law judge, Board, or court as the case may be, which shall be paid promptly and directly by the operator or carrier to the claimant's attorney in a lump sum after the order becomes final.

(b) Section 205(a) of the Black Lung Benefits Amendments of 1981, Pub. L. 97-119, amended section 422 of the Act and relieved operators and carriers from liability for the payment of benefits on certain claims. Payment of benefits on those claims was made the responsibility of the

Trust Fund. The claims subject to this transfer of liability are described in § 725.496 of this part. On claims subject to the transfer of liability described above the Trust Fund will pay all fees and costs which have been or will be awarded to claimant's attorneys which were or would have become the liability of an operator or carrier but for the enactment of the 1981 Amendments and which have not already been paid by such operator or carrier. Section 9501(d)(7) of the Internal Revenue Code, which was also enacted as a part of the 1981 Amendments to the Act, expressly prohibits the Trust Fund from reimbursing an operator or carrier for any attorney fees or costs which it has paid on cases subject to the transfer of liability provisions.

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88-1671

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No. 88-1688

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

GEORGE R. TRIPLETT, ET AL.
Respondents.

OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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STATEMENT

The opinion of the lower court, which appears as an appendix to the Petition for Writ of Certiorari filed by the Department of Labor, is incorporated by reference.

This opinion was originally published as *Committee on Legal Ethics v. Triplett,* 376 S.E.2d 818 (W.Va. 1988), and was subsequently republished, as corrected, at 378 S.E.2d 82.

REASONS FOR DENYING PETITIONS

Contrary to the assertions of the petitioners, the lower court did not fail to give proper deference to a duly enacted act of Congress, nor did it misunderstand or misapply the results and reasoning of *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985). Nor did it lack factual support for its conclusions concerning the operation and effects of the Federal Black Lung Program in West Virginia. Consequently, the petitions for certiorari filed by the United States Department of Labor and the West Virginia State Bar should be denied.

JUDICIAL DEFERENCE

The Department of Labor begins its attack on the lower court's opinion by asserting that "the Court below starkly misconceived its proper role by failing to pay the necessary deference owed to an Act of Congress." Petition at 12. In support of this argument, the petitioner then quotes the following language from the court's opinion in *Walters v. National Association of Radiation Survivors,* 473 U.S. 305, 319 (1985): "Judging the constitutionality of an act of Congress is properly considered the gravest and most delicate duty that [the judiciary] is called upon to perform, and we begin our analysis here with no less deference than we customarily pay to the duly enacted and carefully considered decision of a co-equal and representative branch of our government."

What the petitioner neglects to mention is that the case at bar, unlike *Walters,* does not involve a claim of facial invalidity.[1] The lower court in this case held that

1. It should also be noted that the *Walters* court may have exercised unusual deference in reviewing the VA fee system because "the statute in question . . . [had] been on the books for over 120 years" 473 U.S. at 319. The federal black lung program, on the other hand, has only been in existence for 20 years, and during that brief period of time, it has undergone numerous and extensive revisions and amendments. *See generally Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135 (1987); Lopatto, *The Federal Black Lung Program: A 1983 Primer,* 85 W.Va.L.Rev. 677 (1983). More specifically, there were no regulations concerning attorney fees in black lung proceedings until August 31, 1972. *Watson v. Hew,* 562 F.2d 386, 388 (6th Cir. 1977).

the black lung fee system was unconstitutional *as applied, Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 89 (W.Va. 1988), but the *Walters* Court did not "determine the merits of the appellees' individual 'as applied' claims." 473 U.S. at 337 (O'Conner, J., concurring).

Thus, the lower court's ruling does not challenge an Act of Congress, but its application in a way which is probably contrary to the will of Congress. It is difficult to believe that when Congress created the federal black lung program, it intended to create a system flawed by inordinate delays in paying attorney fees, or that resulted in inadequate compensation for claimants' attorneys. There is certainly no evidence that Congress intended to prevent claimants from obtaining counsel. In fact. such representation is expressly contemplated in the black lung regulations. *See* 20 CFR 725.363(a).

The Walters Decision

In *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985), this Court rejected a due process challenge to the statute which limits the attorney's fee available in Veterans Administration [VA] proceedings to $10.00. Although the petitioners argue that the *Walters* decision compels a similar result in the present dispute, the two cases are so markedly different as to justify different conclusions concerning the constitutionality of their respective fee systems.

What *is* important about *Walters* for purposes of resolving the present dispute is the reasoning used by

the Court in reaching its decision, and not the result itself. Under *Walters,* the lower court was required to balance a number of factors, including the government's interest in retaining the present fee system, the claimants' interest in obtaining black lung benefits, and the danger of erroneous denials of claims if counsel were not available to assist claimants in obtaining benefits. As noted below, the lower court did not err in applying this test.

Government Interest in Regulating Fees

The government's interest in requiring approval of attorney fees in black lung cases is ostensibly to prevent responsible operators and the black lung trust fund from being overcharged. These parties are normally represented by counsel, however, and are quite capable of using black lung proceedings to protect their interests.

The government's interest in prohibiting direct fee agreements between claimants and their attorneys is allegedly to prevent overreaching by counsel. Unfortunately, this scheme which was intended to prevent the needless depletion of benefits frequently results in claimants receiving no benefits at all.

Whatever interest the government may have in protecting claimants from overreaching and excessive fees is adequately protected by the bar's own normative rules. Between 1970 and 1989, West Virginia operated under a code of professional conduct modeled on the ABA Model Code. Effective January 1, 1989, the state adopted the ABA Model Rules of Professional Conduct. Under both sets of rules, ample provision has been made to regulate overreaching and the charging of excessive fees. *See* West Virginia Code of Professional Responsibility, DR 2-106; W.Va. Rules of Professional Conduct, Rule 1.5.

Of course, what the respondent really objects to in this case is not the required agency approval of attorney

fees, or the prohibition against direct fee agreements with claimants, *per se,* but the ordinate delays in payment of attorney fees, and inadequate compensation for attorney fees, which have plagued the system for years. It is doubtful that the state has *any* interest in perpetuating these operational flaws.

Private Interest in Retaining Counsel

Black Lung claimants and recipients have important property interests in receiving the statutory benefits to which they are entitled.

Although this Court has never squarely decided whether applicants for statutory benefits have a property interest entitling them to the protection of due process, its repeated recognition of the due process rights of applicants in government licensing and regulation cases leads to the conclusion that applicants for statutory entitlements should also be accorded due process.[2]

Moreover, the lower courts have frequently held, in cases involving other benefit distribution schemes, that due process does apply in the application stage, because it is the statutory creation of an entitlement, and not the actual receipt of benefits, that establishes a protected property interest.[3] Interestingly enough, some of the

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2. *See, e.g., Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 11-12 (1979) (applicants for parole); *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957) (applicant for admission to practice law); *Goldsmith v. United States Board of Tax Appeals,* 270 U.S. 117, 123 (1926) (applicant to practice before board of tax appeals). *Cf. Gregory v. Town of Pittsfield,* 470 U.S. 1018 (1985) (O'Conner, J., dissenting) (would grant petition for writ of certiorari to determine whether due process protects applicant for general assistance from arbitrary denial).

3. *See, e.g., Daniels v. Woodbury County, Iowa,* 742 F.2d 1128, 1132-33 (8th Cir. 1984) (general assistance); *Kelly v. Railway Retirement Board,* 625 F.2d 486, 489-90 (3d Cir. 1980) (disabled child's annuity under railway retirement act); *Griffeth v. Detrich,* 603 F.2d 118, 120-22 (9th Cir. 1979) (general relief), *cert. denied sub nom. Peer v. Griffeth,* 445 U.S. 970 (1980); *Nat'l Assn. of*

regulations promulgated pursuant to the federal black lung statutes recognize that claimants for pneumonoconiosis benefits have due process rights.[4]

In any event, this Court need not address the nature of a person's purely prospective interest in benefits, since some of Mr. Triplett's clients were claimants "from whom the government sought repayment of an alleged overpayment of benefits," *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 92 n. 31 (W.Va. 1988), or had been "shortchanged" in their benefits. *See* Transcript of Disciplinary Hearing at 67-71 (Testimony of Euna Ball), and these clients clearly had a vested property interest in their benefits. *Cf. Walters v. National Association of Radiation Survivors,* 473 U.S. 305, 320 n. 8 (1985) (diminution in benefits already being received constituted a protected property interest).

Fee limitations also impair enjoyment of an important liberty interest – the right of an individual to consult with attorneys on matters affecting his legal rights. *See Powell v. Alabama,* 287 U.S. 45, 68-9 (1932); *Potashnick v. Port City Construction Co.,* 609 F.2d 1101, 1117-19 (5th Cir.), *cert. denied,* 449 U.S. 820 (1980).[5]

NOTES *(Continued)*

Radiation Survivors v. Walters, 489 F. Supp. 1302 (N.D. Cal. 1984) (veterans' disability benefit), *rev'd on other grounds,* 473 U.S. 305 (1985).

4. *See* 20 CFR §722.122 ("In order to ensure that each claimant for pneumoconiosis benefits under a state workmen's compensation law be afforded *due process of law,* including notice and opportunity to be heard on all matters materially affecting such claimant's claim, no state workmen's compensation law shall be included on the secretary's list unless it provides, or regulations promulgated pursuant to such law provide . . . that a claimant in a contested case shall have a right to a full adversary hearing to resolve contested issues of fact or law") (emphasis supplied).

5. In addition to impairing the ability of claimants to obtain much needed benefits, excluding lawyers from the system may create an appearance of injustice that detracts from the perceived legitimacy of the claims process.

In terms of need, black lung claimants, as a group, more closely resemble the welfare recipients in *Goldberg v. Kelly,* 397 U.S. 254 (1970), than the social security beneficiaries in *Mathews v. Eldridge,* 424 U.S. 319 (1976), or the disabled veterans in *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985).

Under West Virginia law, a miner will seldom be able to recover compensation for pneumoconiosis from his employer in a civil tort action. The standard for recovery established by W.Va. Code §23-4-2 for suits against employers is simply too difficult to meet. *See generally Mooney v. Eastern Energy Associated Coal Corp.,* 326 S.E.2d 427, 433 & n. 2 (W.Va. 1984) (Miller, J., dissenting). Thus, in most cases, a claimant's only hope of obtaining compensation for his black lung related disability lies in some form of state or federal entitlement program.

Many recipients do not have other sources of income,[6] and even when other sources are available, they frequently result in a reduction of benefits under the black lung program. Under 30 U.S.C. §922(b), benefit payments "shall be reduced . . . by an amount equal to any payment received . . . under the workmen's compensation, unemployment compensation, or disability insurance laws of [a miner's] state on account of [his] disability . . . due to pneumoconiosis, and the amount by which such payments would be reduced on account of

---

6. The federal black lung program was created in 1969 largely because "few states provide[d] benefits for death or disability due to this disease [pneumoconiosis] to coal miners or their surviving dependents." 30 U.S.C. §901(a). Twenty (20) years later the Secretary of Labor has yet to find that any state, including West Virginia, has a workers' compensation system which "provides adequate coverage for pneumoconiosis." 20 CRF §722.152(b).

excess earnings . . . "[7] *See also* 30 U.S.C. §932(g), 20 CFR §§725.533(a)(1), 725.536. Black lung benefits may also be reduced because of "[a]ny compensation or benefits received under or pursuant to any federal law . . . because of death or partial or total disability due to pneumoconiosis." 20 CFR §725.533(a)(2). In cases where multiple reductions apply, a claimant's black lung benefits can be reduced to nothing. *See* 20 CFR §725.539.

Probability of Error

Contrary to petitioners' assertions, the probability of error if claimants are not represented by counsel is very high, a conclusion justified by common sense as well as empirical observation.

The black lung program is much more inhospitable to claimants than the veterans disability system considered by this Court in *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985). Even before the 1981 amendments to the black lung act significantly restricted eligibility for benefits, the approval rate for new claims had fallen to 10% or less. Lopatto, *The Federal Black Lung Program; A 1983 Primer,* 85 W.Va.L.Rev. 677, 695 (1983). Following the 1981 amendments, the approval rate was roughly halved, and now stands at approximately 5.8%. *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 88 and n. 15 (W.Va. 1988). By contrast, half of all VA claims are approved. *Walters,* 473 U.S. at 309, 327.

Veteran claims are not subject to any statute of limitations, *Walters,* 473 U.S. at 311, while any claim by or on behalf of a miner must be "filled within three years after a medical determination of total disability due to pneumoconiosis . . . has been communicated to the

7. Unlike many states, West Virginia does provide workers' compensation benefits for the victims of occupational pneumoconiosis. *See, e.g.,* W.Va. Code §§23-4-1, 23-4-6a.

miner . . ." 20 CFR §725.308(a). This time limit is "mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances." 20 CFR §725.308(c).

Veterans also enjoy the services of various veterans organizations which provide competent assistance, free of charge, to anyone who desires their help in obtaining disability benefits. *Walters v. National Association of Radiation Survivors,* 473 U.S. at 311-12 & n. 4 (1985). During the brief 20-year history of the Black Lung Act, no comparable infrastructure has arisen to assist black lung claimants.[8]

Once a veteran files a claim, there are few deadlines to meet, and they tend to be quite liberal. For example, if a veteran is dissatisfied with the ruling of the rating board, he can file a notice of disagreement at any time within 1 year from the date of mailing of notification of the initial review and determination. *Walters,* 473 U.S. at 311; 38 CFR §§ 19.129, 19.124.

At several stages of black lung litigation, however, there are fairly short deadlines which a claimant may have to meet to preserve his claim. *See, e.g.,* 20 CFR §725.403(b) (filing state workmen's compensation claim) (30 days from notice); 20 CFR § 725.409(b) (response to deputy commissioner's notice of denial by reason of abandonment) (30 days); 20 CFR § 725.410(c) (response to deputy commissioner's initial finding of non-eligibility) (60 days); 20 CFR § 725.419 (request for hearing or revision of deputy commissioner's proposed decision and order must be made within thirty (30) days

8. Although the United Mine Workers of America (UMWA) has represented many claimants in the past, economic considerations have forced it to curtail this service. "District 31, one of three districts serving West Virginia, has ceased such representation due to lack of money." *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 92 n. 30 (W.Va. 1988) citing Brief of Amicus Curiae, Jane Moran, attached letter of January 26, 1987 from Eugene Claypole, John Darcus and James Sluser of UMWA.

of issuance); 20 CFR § 725.479 (request for reconsideration of decision by ALJ must be made within thirty (30) days); 20 CFR §§ 725.481, 802.205(1), (appeal to Benefits Review Board [BRB] from decision of ALJ) (30 days); 20 CFR § 802.205(b) (cross-appeal to BRB from decision of ALJ) (14 days); 20 CFR § 725.482 (appeal from decision of BRB to Circuit Court) (60 days). *See generally* 20 CFR § 725.409(a)(3) (a claim may be denied by reason of abandonment when a claimant fails to pursue his claim with reasonable diligence); 20 CFR § 802.205(c) ("Any untimely appeal will be summarily dismissed by the [Benefits Review] Board for lack of jurisdiction.").

Black Lung claimants are usually elderly,[9] unemployed,[10] and sick,[11] with little schooling[12] and

9. According to the Department of Labor's 1983 report to Congress, the miner and widow beneficiaries in its survey were "predominately elderly, with a mean age of 70." U.S. Department of Labor, Employment Standards Administration, *A Sample Survery of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14 (1983). *See also Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong. 1st Sess. 115 (1985) (Statement of James DeMarce) ("the typical incoming claim is from someone whose age is somewhere between the midfifties and midsixties")

10. In 1982, one in twenty miners and widow beneficiaries (5.5%) were employed either full time or part time. . . .

> Of the miners living with their spouses, 9% had wives who worked sometime during 1982. About 3% of the miner beneficiaries worked for pay at some time since receiving black lung benefits. . . .

DOL Sample Survery at 15. *See also Investigation of the Backlog* at 115 (Statement of James DeMarco) (people typically apply for black lung benefits when "they become seriously ill, and are no longer able to work or they may experience a prolonged layoff in the industry and tend to file for benefits at that time; or perhaps most commonly of all, when they retire they will file a claim for benefits").

relatively modest financial resources.[13] These disabilities seriously impair their ability to represent themselves in proceedings which are often "viciously adversarial." *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 92

11. As this Court noted in *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 7 (1976), black lung disease is an irreversible, progressive illness for which there is no therapy. It "affects a high percentage of American coal miners with severe, and frequently crippling, chronic respiratory impairment." *Id.* at 6. *See also Mullins Coal Co. v. Director, OWCP,* 98 L.Ed. 450, 457 (1987).

In 1982, only 5.5% of miners and widow beneficiaries were employed either full or part time. *DOL Sample Survey at 15.* "Of those who were not employed during 1982, 72% of the miners and 60% of the widow beneficiaries reported 'ill or disabled' as the main reason for not working in 1982. *Id.*

The general ill health of black lung beneficiaries should come as no surprise, given their advanced age, and the fact that benefits are only available upon a showing of death or total disability due to pneumoconiosis. *See* 30 U.S.C. §901(a); 20 CFR §§718.1, 725.1, 725.201.

12. In the 1983 DOL survey.

> The typical miner received little formal education; only one in ten graduated from high school. In fact, three-fourths of these miners did not even attend high school. Widow beneficiaries tended to have slightly more education than miner beneficiaries, with 18% being high school graduates. A few of the widow beneficiaries (4%) attended college.

U.S. Department of Labor, Employment Standard Administration, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries,* 14 (1983).

13. *See Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcom. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong. 1st Sess. 131 (1985) (Statement of John T. Jarvis) ("the average black lung recipient is not a wealthy person. The income to the household in general is usually less than $10,000.00"). Sadly, many miners "use up all of their personal finances for treatment of their illness" prior to receiving black lung benefits. *Delays in Processing and Adjudicating Black Lung Claims: Hearing before a Subcomm. of the House Comm. on Government Operations,* 99th Cong., 1st sess. 10-11 (1985).

(W.Va. 1988) citing Brief of Amicus Curiae, Jane Moran, affidavit of Robert Cohen at 8-9, affidavit of Frederick Muth at 5-6.

Under 20 CFR §725.360, responsible coal mine operators and their insurance carriers are parties to black lung proceedings, and needless to say, they have a strong financial interest in opposing claims.[14]

"[T]he responsible operator feels he is going to be paying maybe $50,000 or $100,000 over a lifetime, so he can well afford to spend $5,000 to $10,000 to fight a non-paid attorney." *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong. 1st Sess. 22 (1985) (statement of Martin Sheinman, Esquire).

The presence of parties with interests antagonistic to those of claimants results in a markedly adversarial system. More than ninety percent (90%) of the claims approved at the deputy commissioner level will be challenged by coal mine operators. *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 92 n. 27 (W.Va. 1988). *See also Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the House Comm. on Government Operations,* 99th Cong., 1st Sess. 109 (1985) (statement of James Sluser, Compensation Director, District 31, UMW) ("I know of no responsible operator that has agreed to pay a claim without going through administrative law judge procedures.") This is a far cry from VA proceedings, in which

14. "The actuarial value of a 1982 claim by a living miner with a spouse is nearly $150,000.00." Lopatto, *The Federal Black Lung Program: A 1983 Primer,* 85 W.Va.L.Rev. 677, 686 (1983), citing actuarial chart in Black Lung Benefits Act Annual Report, U.S. Department of Labor 33 (Jan. 1981). In addition to disability benefits, responsible operators are liable for a claimant's medical expenses, 30 USC §932(a), attorney fees. 33 U.S.C. §928(a), 20 CFR §725.367, and interest. *Clinchfield Coal Co. v. Cox,* 611 F.2d 47 (4th Cir. 1979); 20 CFR §725.608(a).

veterans encounter no "opponent" other than a government agency which is required by law to assist them in pursuing their claims. *See Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985).[15]

Even at the deputy commissioner level, which is intended to be fairly informal in operation, claimants can benefit greatly from the assistance of counsel in meeting their burden of proof. The outcome of disability proceedings is often determined by the operation of various legal presumptions which the average claimant is unlikely to know about or understand without professional advice. Attorneys can also play an important role in gathering and interpreting evidence, and presenting the claimants case. *See generally* Sellinger, *What Are Lawyers Good For?: The Radiation Survivors Case, Non-Adversarial Procedures, and Lay Advocates,* 13 Journal of the Legal Profession 123 (1988).

Part of the complexity of black lung practice stems from the fact that the "program has been developed through several statutory enactments [so that] different rules govern claims filed during different periods of time." *Mullins Coal Co. v. Director, OWCP,* 98 L.Ed.2d 450, 457 (1987) (footnote omitted). Consequently, as the lower court observed:

> . . . the history of black lung legislation demonstrates that even the *filing* of a claim for benefits is complex. It often requires a lawyer to determine which benefit structure applies to a particular claim.

Committee of Legal Ethics v. Triplett, 378 S.E.2d 82, 88 (W.Va. 1988) (emphasis in original).

15. In *Walters,* the Court relied heavily on the nonadversarial nature of VA proceedings in upholding a $10.00 limit on attorney fees, warning that "counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding . . ." 473 U.S. at 333.

As claims progress beyond the deputy commissioner level, proceedings become increasingly formal and legalistic. At the ALJ level, parties may cross-examine witnesses, 20 CFR §725.457, take testimony through depositions and interrogatories, 20 CFR §725.458, make oral arguments and file briefs. 20 C.F.R. §725.459. The advantage of retaining counsel in such proceedings is obvious. *See Scanlan v. Secretary of HEW,* 428 F.Supp. 313 (E.D. Pa. 1976) (proper interpretation of medical evidence and proper presentation of case necessitated presence of counsel); *Lincovich v. Secretary of HEW,* 403 F.Supp. 1307, 1313 (E.D. Pa. 1975) (unfavorable ruling reversed after claimant obtained counsel).[16]

According to statistics provided by the Department of Labor, in ALJ proceedings, claimants with attorneys prevail 29% of the time but, when claimants proceed *pro se,* they prevail only 11.6% of the time. *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 98 (W.Va. 1988). Thus, as the lower court noted, claimants with counsel "have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se." Id.* at 97.

These figures stand in sharp contrast to data concerning ultimate success rates before the Board of Veterans Appeals which indicates that veterans with counsel fare only slightly better than veterans represented by various service organizations, or proceeding *pro se. Walters,* 473 U.S. at 331, 327.

This difference in success rates underscores the more difficult nature of black lung claims. As the Court observed in *Walters,* "complex" VA claims amount to only a "tiny fraction" of "the total cases pending." 473 U.S. at 330.[17] "[T]he great majority of [VA] claims

16. It is difficult to imagine how the average black lung claimant, with only a grade school education, can effectively depose a medical or vocational expert retained by his adversary.

17. Cases in which a veteran asserts injury from exposure to agent orange or radiation account for only about 3 in 1,000 claims at the regional level and 2% of appeals to the BVA. 473 U.S. at 329.

involve simple questions of fact, or medical questions relating to the degree of claimant's disability; . . . [and] only the rare case turns on a question of law." *Id.* "The black lung claims process," on the other hand, "is procedurally, factually and legally complex." *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 92 (W.Va. 1988). *See also Mullins Coal Co. v. Director, OWCP,* 98 L.Ed.2d 450, 457 (1987) ("some aspects of the black lung benefits program are rather complex").

The value of having legal representation at black lung proceedings is recognized by everyone who can afford to retain counsel. Responsible coal mine operators and their insurance carriers are represented in black lung proceedings by private attorneys whose fees are not regulated or reviewed by the Department of Labor, while the disability trust fund is represented by attorneys provided by the government.

Unfortunately, the number of attorneys in West Virginia who will represent black lung claimants is small and dwindling. According to the affidavit of Grant Crandall, which was part of the record in the lower court, there are only about twelve (12) attorneys in West Virginia who regularly handle black lung claims. This is a remarkably small claimant's bar given the number of practicing attorneys in West Virginia (over 3,000) and the large number of black lung claims filed in that state (roughly ⅕ of the national total). Although the parties may dispute why this is so, one fact seems unmistakably clear — most attorneys in West Virginia are not willing to practice black lung law on a regular basis.

The reason for this lack of enthusiasm is widely recognized in West Virginia — the present system of compensating attorneys for black lung claimants.

Furthermore, not "all such claims would be complex by any fair definition of that term: at least 25% of all agent orange cases and 30% of the radiation cases . . . are disposed of because the medical examination reveals no disability." *Id.*

> . . . those lawyers who agree to handle black lung cases are having trouble being reimbursed by the Black Lung Office. The result is that in some cases we have fees that are backed up 3 or 4 years.
>
> What is the ultimate result? It is a deterrent and that means that capable lawyers will not be willing to handle the claimants' cases because they know they can never be paid for them.

Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st sess. 32 (1985) (statement of Rep. Robert E. Wise, Jr.).

The Record

In section IV of its opinion, the lower court provided a concise and lucid discussion of the facts which led it to conclude that long delays in payment, "without any provision for interest, and the lack of premiums to offset the contingent nature of the work," discouraged most attorneys in West Virginia from handling black lung claims. 378 S.E.2d at 91.

The court had an adequate factual basis for these conclusions. In addition to various government reports and congressional hearings cited in its opinion, it had the benefit of the transcript from Mr. Triplett's disciplinary hearing (at which several attorneys testified concerning the operation of the black lung program in West Virginia), the *amicus curiae* brief filed by Jane Moran, Esquire (who has herself been actively involved in representing claimants in black lung proceedings), affidavits submitted by five (5) attorneys who constitute approximately ⅓ of the lawyers who regularly handle black lung claims in West Virginia at this time, and various materials submitted by the Department of Labor to supplement the record.

Mrs. Moran's memorandum is attached to this opposition at pages 1a-10a. The affidavit of Thomas H. Zerbe, Esquire appears as an appendix to the Department of Labor's petition for certiorari at pages 11a-32a. The other four (4) affidavits considered by the lower court appear as appendices to this opposition at pages 33a-45a. Selected excerpts from the transcript of Mr. Triplett's disciplinary hearing (which is 329 pages long in its entirety) appear as an appendix to this opposition at pages - .

Respondent respectfully submits that this material provided an adequate factual underpinning for the lower court's conclusions.

Conclusion

For the foregoing reasons, the respondent respectfully submits that the petitions for certiorari should be denied.

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APPENDIX

IN THE
SUPREME COURT OF APPEALS OF
WEST VIRGINIA AT CHARLESTON

Disciplinary Proceedings No. 18396

COMMITTEE ON LEGAL ETHICS
OF THE WEST VIRGINIA STATE BAR,
Complainant,

v.

GEORGE TRIPLETT, a member of the West Virginia State Bar,
Respondent.

BRIEF OF AMICUS CURIAE JANE MORAN

Jane Moran
Attorney at Law
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There presently exists in the State of West Virginia a large population of sick, old coal miners, their dependents or their survivors. Many[1] have waited for extended periods of time – some over ten years – for Administrative review of their Black Lung claims. Most of them will discover, when they finally have their day in Court, that their claim is technically without merit or has been precluded from consideration by legislation enacted years before their appearance. They have continued in their misguided belief in the validity of their claim

1. Exact figures of the present backlog of cases is not available but is estimated to be in the thousands.

because they have not been able to obtain competent counsel to review it for them.

A high price is demanded of those who attempt to extract the life's blood of West Virginia's economy from the arteries in her mountains. As his lungs become clogged with the insidious and pervasive dust, the miner is given a graphic projection of the quality of life which lies ahead. The nature of the disease being progressive, the miner feels himself increasingly weakened and helpless; unable to provide even the most modest of support for his family.

The full extent of the debilitating impact of long term exposure to coal dust was recognized with passage of the Black Lung Benefits Act in 1969. The Act – one title of the Federal Coal Mine Health and Safety Act[2] – was Congress' acknowledgement of the failure of state workers' compensation programs to address the devastating effects of this disease.

The original legislation was comparatively narrow in scope. It covered underground miners and their wives or widows only. The definition of pneumoconiosis was restricted. Widows could not claim benefits unless the miner was collecting benefits at the time of his death or it could be proven that his death was caused by pneumoconiosis. Subsequent amendments to the law[3] expanded these definitions, but also created a maze of evidentiary hurdles and procedural complexities. The regulations which control review of a Black Lung claim are now determined by the point in time at which a

2. 83 Stat. 792, 30 U.S.C. 801 et seq.

3. Black Lung Benefits Act of 1972, 86 Stat. 151, 30 U.S.C. 901 et seq.; The Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, The Black Lung Benefits Reform Act of 1977, 92 Stat. 96; The Black Lung Benefits Amendments of 1981, 95 Stat. 1643; The Black Lung Benefits Revenue Act of 1981, 95 Stat. 1653, 26 U.S.C. 1 note and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272 13203(a)(d), 100 Stat. 312, 313, 26 U.S.C. 9501 note (1986).

claim was filed. Part B of the Act sets the standards for claims filed before July 1, 1973.[4] Part C of the Act provides for claims filed on or after July 1, 1973. There are sub-sections of Part C. One section covers claims filed before April 1, 1980 – the other claims filed after April, 1980. These later sections are regulated by "Permanent Criteria" and "Interim Regulations", respectfully. The legislation and the regulations are overlapping and seemingly contradictory. These apparent irregularities have been the subject of considerable case law. The result is an extremely detailed and complex body of law which is material for nightmares of attorneys venturing into this field of law for the first time. The threat is intensified by the total lack of facilities providing an educational background in this field or even a more modest offering of seminars.

As the complexities of the law evolved, several other factors combined to delay the processing of claims. The changes in the law resulted in different agencies handling the claims. Most of the cases previously processed by the Department of Health, Education and Welfare were transferred to the Department of Labor in 1974. In 1977 the Department of Health, Education and Welfare and the Department of Labor were told to review all previously denied and pending cases under the new legislation. Claimants were given their choice of agency to review their claim. During the late 1970's and early 1980's the Department of Labor hired an unprecedented number of Administrative Law Judges to perform the mandated new processing. Hundreds of cases were set for hearing. The Judges and the claimants soon discovered there were few lawyers available to handle the overload.

The Black Lung Bar in West Virginia was active and comparatively numerous during the years after passage

4. And, for a limited number of survivor's claims filed after 1973.

of the original Act. This group diminished as the burden of proof shifted further against the claimant with each new layer of legislation.[5] Presumptions that had previously been available to balance the uncertainties of medical testing devices were limited or abolished. Entire categories of eligible claimants were excluded by the new amendments. Reporting requirements for fee petitions were — and are — onerous and time consuming.[6] Presently, the award of fees is restricted — the hourly rate unpredictable. The slow process of appeal, further elongated by remands for development of evidence, has resulted in years of delay before the counsel for a successful claimant receives his or her fee.

The cost of litigating these claims escalated for the claimant as his burden of proof increased. Defense counsel, taking full advantage of the more rigid standards, initiated discovery procedures which paled by comparison those used in the earlier stages of law. Claimants' attorneys are now faced with extensive interrogatories. They are required to travel out of state for depositions, accruing not only travel costs, but the expense of days lost from their offices to travel time.

The shift of the burden of proof in the law has been exaggerated in effect by the refinement of defense medical techniques. X-rays are read and re-read by defense doctors. A minority of claimants are able to bear the expense of a reputable facility for original testing and evaluation of their condition. Those who are, have watched these valid, objective evaluations of disabling lung disease caused by coal dust discredited by the sheer numbers of defense doctors who explain away the disease of other factors. Supported by seemingly endless

5. Statistics provided by the U. S. Department of Labor, Office of Coal Mine Safety and Office of Workers' Compensation Programs reflect the following success rates on Black Lung claims: (See attached page)

6. See Exhibit 1 attached to this Brief at pages 6 & 7 and Exhibit 5 at page 2.

resources, defense counsel have been increasingly skillful at deflecting the impact of credible claimant's evidence.

These factors have converged to drive experienced counsel from the field of Black Lung litigation and to discourage new practitioners from entering the field. Concurrently, the burden of Black Lung representation previously carried by the federally funded Legal Services Corporation and District 31 of the United Mine Workers of America has been dropped. Until steps are taken to relieve claimant's counsel from the unreasonable and unrealistic financial burden which the present legislative structure places on them, there is no reason to believe the present crisis in representation will be relieved.

A bottleneck in processing pending West Virginia claims occurred in the early 1980's and, as a result of the factors listed above, has continued to exist up to the present. Some claimants who filed as long ago as 1979[7] are now being brought before a Judge for hearing.

The present active Black Lung Claimants Bar in West Virginia is limited to less than fifteen members. Hundreds of pending claims remain to be set for hearing. Claimants have been required to take action to maintain the vitality of their claims during the years of waiting. Those with counsel have managed to comply with the reporting requirements. Many of those without counsel or who are represented by attorneys unfamiliar with the law will find, when they finally reach the Court, that their claim is dead.

Equally frustrating is the experience of those classes of claimants who have been excluded from or included in coverage by amendments to the law or regulations of such complexity as to be incomprehensible to any but

7. William H. Acord. Claim No. CH 232-18-1714, 88 BLA 2407.

the well trained legal mind.[8] It is unrealistic to assume

8. Set forth below is a footnote from a paper titled "Notes on the Black Lung Benefits Act" by Nicodemo DeGregorio. It has been favorably recognized and your petitioner has been provided with a copy by an Administrative Law Judge in response to her inquiries regarding the history of the act.

> The coverage of coal transportation work presents peculiar problems. One problem arises where the area of extraction (mine) and the area of preparation (tipple) are not contiguous, and coal is transported from the mine to the tipple over public roads. Whether a truck driver performing such transportation work is a miner over the entire route depends on such factors as the distance separating the tipple from the mine, ownership or operation of both the tipple and the mine by the same operator, employment by this operator, etc. It is apparent that the Reform Act has enlarged the definition of "miner" (1) by covering a greater area, "in or around a coal mine or coal preparation facility", and additional functions, "coal mine construction or transportation", and (2) by removing the requirement of "employment". It is noted that the Act in effect presumes that a miner engaged in the extraction of preparation of coal is exposed to coal dust, but makes coverage of the additional functions explicitly subject to a showing of exposure to coal dust. This difference, however, is minimized by the presumptions created in 20 C.F.R. 725.202(a). This section provides that in the case of an individual engaged in coal transportation or coal mine construction there shall be a rebuttable presumption that such individual was exposed to coal mine dust during *all* periods of such employment occurring in or around a coal mine or coal preparation facility. The section also provides that an individual employed by a coal mine operator, "regardless of the nature of such individual's employment", shall be considered a miner unless such individual was not employed in or around a coal mine or coal preparation facility.
>
> Thus, in order for an individual to come within the definition of "miner" both the situs test and the function test must be met. Although these two elements of the definition are conceptually distinguishable, they may best be handled together. Specifically, it would appear that in most cases the situs factor would be predominant and would draw within the definition work which, by itself, would not be deemed extraction or preparation of coal. For example, a mechanic engaged in the repair and maintenance of mining equipment may well be deemed a miner if the work is done, as a rule, in or around a mine or coal preparation facility. The case may be quite different if the same work on the same equipment is performed in a shop at some distance from the mine or facility, especially if the shop is owned by a person other than the owner of the mine or facility. It is suggested, as a working hypothesis, that all activities which (1) are *regularly* performed in or around a mine or preparation facility, and (2) are an integral part of the *process* of extracting or preparing coal, come within the meaning of "in the extraction or preparation of coal". See *Smith v. Central Ohio Coal Co.*, ____BRBS ____, BRB No. 77-293 BLA (January 31, 1979). On this theory, coal cutting or scraping, coal loading, roofbolting, repair and meaintenance, laying of tracks, operating of shuttle cars, are all covered activities if performed in a covered area.

that the average lay person can even detemine the qualifications for becoming a member of the covered class. No one can seriously argue the lay person is competent to comprehend the even more complex framework of medical proof required for a winning claim.

The problems created by the backlog of unrepresented claimants is shared by all parties involved in the litigation. Claimants appear for hearing with no understanding of procedure or proof requirements. The Administrative Law Judges travel to hearing locations throughout West Virginia from their offices situated throughout the country. They have typically issued notices for three to four day dockets. These dockets often degenerate into a series of continuance motions by claimants who have been unsuccessful in their search for counsel. Conscientious defense counsel must justify to their client the escalating costs of this seemingly unproductive ritual.

Attached to this Brief are five affidavits of attorneys who actively practice in the Black Lung Bar. (Exhibits 1 through 5). They represent approximately one-third of the West Virginia practitioners who are active in the

field. They all discuss the problem which must be addressed before there can be any realistic hope of expanding the Black Lung Bar. The costs of litigating a significant number of Black Lung claims is unrealistic for the medium or small size firm; it is impossible for the solo practitioner to bear. Until the fee structure is redesigned to accommodate extraordinary litigation expenses of Black Lung claims, there is no inducement for attorneys to venture into this area where the odds of success are so small. Until some provision is made to provide for investigation and discovery costs, claimant's counsel is left at the mercy of defendant's counsel, who are being paid for each hour of discovery which they initiate and reimbursed for their investigation costs. The problem can only get worse unless some form of aggressive action is taken.

Several suggestions were generated at a recent joint meeting of the Administrative Law Judges, representatives of the West Virginia Board of Health, defense counsel and claimant's counsel.
They include:

1. Amendment to the law to allow for a retainer fee.

2. Amendment of the law to allow certification for a minimal fee for representation.

3. A minimal fee paid from the Black Lung disability Trust Fund.

4. A fund created by the West Virginia State Bar to pay the costs of the Legal Services Corporation reassuming the burden of this litigation which they once shared.

5. Regulations which would require counsel for both the defense and the claimant to work on a contingency fee arrangement.

Some aggressive action must be taken if the Black Lung benefits program is to remain a viable assistance program for miners disabled as a result of exposure to coal dust. A labyrinth of regulations lies between each Black Lung claimant and the benefits which have been set aside for him. Without competent counsel to guide him, the quest becomes increasingly hopeless. One approach to making the law more responsive to the people it was enacted to serve is to provide a fee structure within which competent counsel are willing to work. Until this is provided, claimants will be unable to obtain adequate legal assistance and will thus be denied their due process rights under law. [SIGNATURE AND ADDRESS OMITTED]

BLACK LUNG CLAIMS
January 1, 1982 - March, 1988

Fiscal Year	Initial Claims	Initial Approval After Exam by Dept of Labor Doctor	Initial Denials	Reversal of Initial Denial After Submission of Evidence	Reversal of Initial Approval after Submission of Evidence	Overall Approval Rate (not included in Dollar Statistics)
88 (1st Qtr.)	2,066	80	1,986	+18	-4	
87	8,668	317	8,351	+77	-25	
86	9,813	280	9,533	+158	-15	
85	11,116	374	10,742	+125	-38	
84	13,145	617	12,528	+111	-15	
83	11,259	483	10,776	+77	-10	
1/1/82-9/30/82	2,613	74	2,539	+8	0	
Totals:	58,680	2,225	56,455	+574	107	4.6%

ALJ & Benefits Review Board
January 1, 1982 - December 31, 1987

	Approvals		Denials	Totals	Approval Rate	
			ALJ Decisions			
Total Appeals	Uphold	97	2,883	2,980	22.7%	3.4%
3,819	Reversal	770(-)	69(+)	839		
	Total	867	2,952	3,819		
			Benefits Review Board Decisions			
Total Appeals	Uphold	2	151	153	4.6%	3.4%
175	Reversal	6(-)	16(+)	22		
	Total	8	167	175		

AFFIDAVIT

STATE OF WEST VIRGINIA,
COUNTY OF MARION, TO-WIT:

This day before the undersigned authority, a Notary Public in and for the County and State aforesaid, appeared ROBERT F. COHEN JR., who after being duly sworn, deposes and says:

I have been engaged in the practice of law for 14 years. Except for one year when I lived in Charleston, West Virginia, I have practiced in Fairmont, West Virginia. During this period I have represented former coal miners in federal black lung claims. My experience in the representation of claimants in black lung cases includes representation before the Social Security Administration under the 1972 Amendments to the Act, and before the United States Department of Labor in cases arising under the 1972 Amendments, the 1977 Amendments and the 1982 Amendments to the Act. I have handled appeals of denials in both the United States District Court for the Northern District of West Virginia and the United States Court of Appeals for the Fourth Circuit.

From the time I began handling black lung claims until a few years ago, I represented a large volume of claimants in these cases. However, over the past several years, I have had to restrict my practice (or at least the intake of new black lung cases) very drastically. The reasons for this include restrictive changes in the law, the inefficient processing of claims by the Department of Labor, and the inability to get paid even in the cases in which I prevail.

The law was changed by the 1982 Amendments to become much more restrictive in its eligibility criteria. Most notably, these changes eliminated the presumption that a miner who had worked for 15 or more years and who is suffering from a totally disabling chronic

respiratory or pulmonary impairment would be presumed to have pneumoconiosis. As a result of these restrictive amendments, far fewer claimants are winning their claims than at an earlier time. I have heard estimates that approximately 10% of claimants are awarded benefits under the 1982 Amendments. My own experience would indicate that this estimate is reasonably accurate.

However, the restrictive changes in the law are not the major reason why I am restricting my black lung practice. Much more significant to me is the incredible inefficiency of the appellate process in the Department of Labor and the inability to collect a legal fee even when I have prevailed in a case.

When I speak of inefficiency in the Department of Labor, I am primarily referring to the Benefits Review Board. There are delays in the processing of claims by the Office of Administrative Law Judges. However, these delays are not nearly as great as they used to be. Moreover, my experience is that the majority of administrative law judges make a good faith effort to process black lung claims fairly and efficiently.

The level at which the system has entirely fallen apart is the Benefits Review Board. The Benefits Review Board has always taken a long time to issue decisions. Right now, it is taking from two to three years, from the time that a notice of appeal is filed, to the time when the Board will issue a decision. This delay is not the fault of the lawyers for claimants or employers. Under the Rules of the Benefits Review Board, briefs must be filed shortly after the Board issues an acknowledgement of a notice of appeal. What typically happens is that after the briefs are filed, it still takes the Benefits Review Board a couple of years to issue a decision.

When the Benefits Review Board finally issues a decision, the result is frequently a remand to the Administrative Law Judge requiring the Judge to reevaluate the evidence. Although the Board articulates a standard

of "substantial evidence", and claims that it does not substitute its judgment for that of the Administrative Law Judge, my opinion is that this is not the case. It appears to me that the Board makes a practice of re-weighing the evidence and substituting its opinion for that of the Judge. In particular, I believe that the Board does this with a degree of bias in favor of the denial of claims.

Over the last eight or nine years, the Benefits Review Board has issued a number of very significant decisions which restrict eligibility and which have been reversed on appeal in the various federal circuit courts of appeal. This pattern of legal mis-interpretation is consistently anti-claimant. Because of the slowness of the process, it is frequently many years until the legal mis-interpretation by the Benefits Review Board is corrected. For example, in 1987, the United States Court of Appeals for the Fourth Circuit issued a decision in *Sykes v. Director, OWCP,* 812 F.2d 890 (4th Cir. 1987), which reversed an extremely important decision which the Benefits Review Board had issued in 1980. Between 1980 and 1987, there were probably thousands of incorrect decisions issued because of the Board's decision in *Sykes.* Now some of these decisions are being reviewed again for those claimants who kept their appeals alive. However, there is a vast number of claimants who simply abandoned their claims after being denied. Some of these claims are meritorious, and now they cannot be litigated because of the incompetence and bias of the Benefits Review Board.

Moreover, as a result of the Benefits Review Board issuing legally incorrect decisions, cases frequently bounce back and forth between the Board and the Administrative Law Judge as one decision after another is remanded. For example, in one of my cases, the Administrative Law Judge issued an award of benefits in 1982, the employer appealed, the Benefits Review Board sent the case back to the Judge in 1985, the Judge again

issued an award of benefits in 1985, the employer appealed again, and the Benefits Review Board again remanded the case on July 27, 1988. After the Administrative Law Judge's next decision, I would guess it will be 1991 before the Board issues another decision. This is on a claim which was filed in 1978. This history of delays is not particularly unusual. In one of my cases, the claimant filed his claim in 1976, an Administrative Law Judge issued a decision awarding benefits in 1984, the employer appealed, the Benefits Review Board remanded the case in 1986, the case was assigned to a different Administrative Law Judge who denied benefits in 1987, and it is now before the Board on my appeal. In another case, the claimant filed his claim in December, 1973, I began to represent him in December, 1975, the Administrative Law Judge awarded benefits in 1987, and we are presently awaiting the processing of the case by the Benefits Review Board.

The third element which makes it difficult to continue to represent black lung claimants is the inability to get paid for my work. The law is structured so that when a claimant has been awarded benefits, any legal fee will be paid by the responsible coal operator or, if there is no operator involved in the case, by the Black Lung Disability Trust Fund. Thus, the claimant will not have to pay a legal fee for representation. To obtain a fee, a lawyer must submit a properly executed fee application to the appropriate decision making level within the Department of Labor. In other words, the lawyer sends one fee application to the Deputy Commissioner for his time spent at that level of the case, a second fee application to the Administrative Law Judge for his time spent at that level, and a third fee application to the Benefits Review Board for time spent at that level. Usually there are lengthy delays from the time that a fee application is submitted to the time that it is approved. In addition to the normal human delays, the processing

of the fee application is delayed if the particular administrative level does not have the file. Thus, for example, I submitted a fee application to the Deputy Commissioner two and a half years ago in a case, and the application has not been acted upon because the file is at the Benefits Review Board.

Even after the fee is approved, the claimant's attorney does not get paid if the case is on appeal. This is because of a policy which provides that the decision must be "final" before the claimant's attorney is paid. Thus, in the case I mentioned earlier, where the Administrative Law Judge awarded benefits to the claimant in 1982, my fee application was approved by the Judge in 1982 but I have not been paid yet. There is no provision in the regulations for any interest on an attorney fee. Thus, in the case which was approved in 1982, I have been making an interest-free loan of over $3,000.00 to Consolidation Coal Company for the past six years. In another case, where the Deputy Commissioner had made a finding in favor of the claimant and the employer appealed, the Administrative Law Judge after the hearing dismissed the employer based on a finding that the claimant had not been a coal miner after 1969 and remanded the case to the Deputy Commissioner for the continued payment of benefits based on the claimant's work as a miner prior to 1969. The Director of the Office of Workers' Compensation Programs has appealed this decision to the Benefits Review Board. The Director does not contest the claimant's entitlement, but only the finding that the coal company should have been dismissed. The Administrative Law Judge has awarded me a fee which the Director refuses to pay because the case is not yet "final". Thus in this case, I am making an interest-free loan of over $6,000.00 to the Black Lung Disability Trust Fund in a case where the claimant's eligibility is not an issue on appeal.

At the present time I am owed in excess of $30,000.00 in black lung attorney fees which have been

awarded over the years but not yet paid. This does not count a number of situations where I have simply not filed the fee application as yet because I know it will not be acted upon by the Deputy Commissioner (because, as mentioned earlier, the Deputy Commissioner does not have the file).

I have seen numerous letters from the Department of Labor to claimants stating that they can get a lawyer to represent them and will not have to pay for it. I find this practice somewhat disingenuous in view of the fact that the Department of Labor is unable to process claims efficiently or (in many cases) correctly, together with the fact that claimants' representatives cannot get paid even after they prevail in the case.

The final element in this situation is that the cases have become increasingly complex, and that coal companies spend great resources to fight black lung claims. Thus, in addition to retaining highly competent counsel (who I assume are well and promptly paid), the coal companies expend great sums of money for physicians to perform examinations, re-read x-rays and review medical records. In any given case, I am confronted with a physical examination performed by the employer's physician, numerous x-ray re-readings made by the employer, and one or more reports by pulmonary specialists based on reviews of the evidence in the record. A claimant cannot possibly win a black lung case these days without expending resources to match these efforts by the coal companies. This is both expensive for the claimant and very time-consuming for the lawyer. In addition, a claimant's lawyer must spend time answering interrogatories propounded by the employer's counsel and appearing at depositions initiated by the employer's counsel. As a result of the complexity of the cases, the need to respond to the employer's evidence, and the usual necessity of submitting a post-hearing brief, I usually spend between 40 and 50 hours on a single black lung case just at the hearing level. This does not include

the time spent writing multiple briefs on appeal. I can only be paid for this time if I win the claim, and there is no way to predict when I might get paid even if I do win the claim.

Over the years I have become familiar with lawyers who specialize in black lung claims throughout West Virginia and particularly in the northern part of West Virginia where I practice. As a result of the factors set forth herein, very few lawyers are now willing to represent claimants in black lung cases. Over the years I have tried to bring other lawyers in this geographical area into the practice of black lung law on behalf of claimants. Of those who I have tried to encourage in this work, I know of only one who is still doing it. Some of the others are not real happy with the fact that I got them into the field. At the present time I know of only two other lawyers in northern West Virginia who represent claimants with the same degree of skill which I strive for in my practice.

An additional factor in the inability of claimants to obtain representation in black lung cases in northern West Virginia is the fact that District 31 of the United Mine Workers of America no longer represents claimants. Attached to this affidavit is a form letter sent by District 31 to its membership on January 26, 1987. As the letter states, District 31 withdrew from representing claimants 60 days from the date of that letter. Also attached to this affidavit is a letter sent by District 31 to its membership on June 25, 1987. This letter, which I believe was designed to try to assist members of the union in securing representation, listed two lawyers in northern West Virginia who might represent them. The two lawyers are myself (together with my partner, Richard Paul Cohen, who leaves the practice of black lung entirely up to me in our firm) and Gary Martino. It is my understanding that Mr. Martino has also greatly restricted his black lung practice because of the factors set forth in this affidavit.

Hence, it is my belief that very few claimants are now being represented in their black lung claims. This results from a variety of factors, most of them attributable to the Department of Labor. I cannot believe that the Department of Labor is not aware of this situation. Because of the Department of Labor's continued statements to claimants that they may obtain free representation from lawyers in black lung cases, together with the Department of Labor's unwillingness to take any steps to change the situation, I have come to the conclusion that the Department of Labor probably desires the result of few claimants having representation, or at least is satisfied with it. [SIGNATURE AND ACKNOWLEDGEMENT OMITTED]

UNITED MINE WORKERS OF AMERICA
BENEFIT SERVICE FUND

JAMES SLUSSER - DIRECTOR
LOWELL SATTERFIELD - ASST. DIRECTOR

TELEPHONE 363-7500

UNITED MINE WORKERS BUILDING
310 GASTON AVENUE
FAIRMONT, WEST VIRGINIA

FILE NO.
SSA NO.
CLAIM NO.

June 25, 1987

Dear Sir and Brother:

Please find listed below the names, addresses and telephone numbers of attornies you might like to contact to see if they would represent you on your federal black lung claim.

Gary Martino, Attorney
Claggett, Gorey, and Martino Law Firm
99 Fairmont Avenue
Fairmont, West Virginia 26554
Phone: (304) 367-1514

Richard Paul Cohen, Attorney
Robert F. Cohen, Jr., Attorney
Cohen, Abate and Cohen Law Firm
Security Bank Building
Fairmont, West Virginia 26554

If you have any questions, please do not hesitate to contact our office.

Fraternally yours,

James H Slusser

James H. Slusser, Director

JHS/wc

UNITED MINE WORKERS OF AMERICA
BENEFIT SERVICE FUND

JAMES SLUSSER - DIRECTOR
LOWELL BATTERFIELD - ASST. DIRECTOR

TELEPHONE 363-7500

UNITED MINE WORKERS BUILDING
310 GASTON AVENUE
FAIRMONT, WEST VIRGINIA 26554

FILE NO.
SSA NO.
CLAIM NO.

January 26, 1987

Re: Federal Black Lung Claims

Dear Member:

The District 31 Compensation Department has provided assistance and legal representation to the membership over the years on state and federal black lung claims. The Benefits Service Fund receives Fifty Cents ($0.50) of each member's dues for this purpose.

The membership dues reimbursement has dropped drastically due to layoffs and closure of mines. The working membership has been reduced from 13,000 members to a little more than 5,000.

In order for the Compensation Department to continue operation the District 31 Executive Board and the Trustees of the Benefits Service Fund have voted to cease legal representation on federal black lung claims.

Legal representation from private counsel can be obtained at no cost to the claimant, if accepted by private counsel, because the Federal Trust Fund itself pays for legal representation and expenses on all claims won.

Legal representation will continue for a period of sixty (60) days from the date of this letter on all claims. No further legal representation will be provided after April 1, 1987. The Compensation Department will still

be available for the filing of claims and filling out of forms regarding federal black lung.

Fraternally yours,
Trustees, Benefits Service Fund

Eugene Claypole

Eugene Claypole

John Darcus

John Darcus

James H. Slusser

James H. Slusser

STATE OF WEST VIRGINIA,
COUNTY OF MERCER, To-wit:

I, FREDERICK K. MUTH, of 2920 East Cumberland Road, Bluefield, West Virginia, Attorney at Law, after being duly sworn, depose and say:

"I am an Attorney at Law practicing in Bluefield, West Virginia, and have practiced in the State of West Virginia for over 15 years. A significant portion of my practice since 1973 has been devoted to the representation of claimants for occupational pneumoconiosis benefits and federal black lung benefits before the State Workers' Compensation Fund and the Social Security Administration and U.S. Department of Labor, respectively. During that period of time, I have represented at least several thousand individual claimants for benefits. In recent years it has come to my attention as a practitioner in this field, that it has become increasingly difficult for potential claimant beneficiaries to retain skilled and competent representation primarily because of the fee structure which has been imposed under the federal program.

Prior to enactment of the 1972 amendment to the Federal Coal Mine Health & Safety Act, customary practice for retention of claimant's attorneys had been to accept employment on a so-called contingent fee basis similar to the practice then and now prevailing for retention of counsel by plaintiffs in personal injury litigation. The most common practice prior to the 1972 amendment had been for claimants to employ counsel on a contingent basis involving counsel's entitlement to 25 percent of retroactive benefit payments in the event of successful recovery and after deduction for expenses necessarily incurred in making the recovery. After the initial amendment this practice was altered by a federal regulation which then imposed upon attorneys the requirement to file a formal fee petition with the Social Security Administration, who was then administering

the federal program. As a result, counsel was then required under the so-called Trust Fund theory to submit a fee petition to the Administration detailing the nature and extent of services rendered in support of an authorized fee by the Administration which would be deducted from a claimant's retroactive benefit payable. The practice under the regulation was justified by the Federal Court system on the basis of the so-called Trust Fund theory with the rationale being offered that since benefits provided under the program were primarily for the purpose of compensating individuals who qualified, the administering agency had a Trust Fund duty imposed to insure that such intent would be indeed implemented. See generally 20 C.F.R. §140.686 and §410.687. This system also provided for a challenge to a fee sought to be charged for services rendered by the successful claimant himself. Upon implementation of the 1977 amendment to the Federal Coal Mine Health & Safety Act, further provisions in attorney fee regulations were had pursuant to 20 C.F.R. §725.365-367. The new regulations altered the prior practice by imposing directly upon the employer or upon the Trust Fund responsibility for direct payment of attorney fees pursuant to the aforesaid petitioning scheme without such funds being deducted from a claimant's retroactive benefit except in cases where the attorney was retained prior to a denial of his claim. Informally, the U.S. Department of Labor, who took over responsibility for administration of the program in July of 1973, however, initiated the practice of imposing maximum hourly fees for services rendered while retaining under the regulation the proviso that fees would only be paid in instances of successful recoveries. Fees paid initially and despite the contingent nature of the rearrangement were customarily permitted at approximately Fifty Dollars ($50.00) to Sixty Dollars ($60.00) per hour. From initial retention of counsel to the point of successful conclusion of a case often involved time periods of two to eight years

or more. Gradually allowances by the agency on the basis of contingent recoveries and hourly rates have worked their way up to the current level where the representative may expect fees of approximately Eight-five Dollars ($85.00) per hour being permitted by the U.S. Department of Labor's Office of Deputy Commissioner and up to One Hundred Twenty-five Dollars ($125.00) an hour for services rendered before the Office of Administrative Law Judges or Benefits Review Board. At the present time, litigation in a typical case will average between two and eight years depending upon the length of appellate litigation. At the same time significantly greater and more stringent requirements for eligibility of claimants as well as the sophistication of defense techniques has resulted in much lower levels of claims allowance by the agency.

The foregoing situation has resulted in far fewer qualified attorney representatives being willing to accept employment, and in many instances attorneys are no longer willing to represent claimants at all. I and other members of my firm have particularly noted the increase in interviews with claimants who were once represented by other attorneys where the prior representative has withdrawn. In informal discussion with fellow members of the Bar, we have been given to understand that the primary reason for the decline in the numbers of attorneys willing to accept employment in such cases has been because of the length of litigation together with the relatively low rate of compensation as compared with fees available in other forms of contingent fee litigation. Such factors along with the increasingly more complex nature of the litigation has obviously forced the withdrawal of many otherwise qualified claimant representatives from the field.

Currently most employer defense efforts are concentrated in the hands of relatively large urban law firms who specialize in the defense of such claims on behalf of their clients. The total situation has had the net effect of

depriving many individual claimants with marginal or less than optimal cases of adequate representation, and indeed it has become increasingly common to find instances of U.S. Department of Labor hearing dockets populated primarily with *pro se* claimants. Increasingly, firms, such as my own, become inundated with interviews with prospective clients who have been unsuccessful in their efforts to retain competent representation. This situation results in firms, such as ours, being highly selective with respect to claims wherein we will accept employment so as not to overburden the case load of individual attorneys within the firm.

It is not uncommon for particularly desperate individuals to offer individual attorneys unauthorized "bonuses" as an inducement for accepting employment. Although I have never accepted such unauthorized payment, and continue to refuse to do so, the fact that such inducements are offered in the first instance would most certainly appear to be an indication of the desperation of many of our potential clients.

Finally, it should also be pointed out that it has become an increasingly common tactic among firms engaged in employer defense of these claims to expand defense budgets in individual claims for the purpose of quantifying evidence, often times to an outrageous extent. Aside from the question of attorney fees, employers will often engage in the practice of rereading x-rays to such an extent that even a claimant with a meritorious case may have difficulty providing the cost necessary for equalizing evidence. The practice extends to bringing in professional consultants at high expense to the employer to review medical records and to render opinions in support of a defense. Individual claimants often find it impossible to support the cost of equalizing such evidence, and this, in turn, significantly diminishes the chances for a successful recovery. Attorneys who are experienced in this form of litigation know too well that such practices by employer's representatives will also

have the effect of diminishing the chances for recovery on the part of a claimant, and this, in turn, given the present fee structure, further diminishes a claimant's chance for retaining competent and knowledgeable counsel.

For the foregoing reasons, I would strongly urge that serious thought be given by members of the State Bar Committee to recommendations to the appropriate agencies and courts for a review and revision of those rules and regulations dealing with claimant attorney representation and the method provided by such rules and regulations for payment of attorney fees."

Further the deponent saith not. [SIGNATURE AND ACKNOWLEDGEMENT OMITTED]

AFFIDAVIT

I, Robert T. Noone, hereby state as follows:

I am an attorney in Logan County, West Virginia who has been practicing in the area of Black Lung for approximately five years. At present, I have seriously restricted my intake of new cases to approximately one out of every thirty possible claimants who consult with my office. It has been my experience that even meritorious cases are regularly being denied, and thus I cannot afford to practice this area of law any more.

I have witnessed this past year the denial of miners who have over 30 years coal dust exposure, positive x-rays, qualifying blood gas studies, and physicians opinions indicating total disability. Unfortunately, my clients cannot accumulate the funds necessary to counter all the negative medical evidence of the employer's "consulting" physicians who render reports that the claimant at age 65 can return to his former employment, or that the disability is because the claimant is fat or he smoked.

Normally a claimant must have at least $1,500 to pay for medical evaluations by qualified experts. This is simply too much costs for the average disabled miner. Therefore, without proper funds for evaluations, I have to turn the case away. I would like to advance the costs of evaluation, but I already front the costs of my staff time, my time, travel time and expenses to depositions, postage, phone calls, copying costs, etc. Further, I realistically know that many cases are denied despite the positive medical evidence produced by the claimant.

I would advocate that some fee structure be permitted to allow attorneys to further examine cases for fair compensation, rather than donate time. So often I see winnable cases that I just cannot take because I cannot take the chance financially due to the great investment of attorney and paralegal time.

This problem is made worse by the fact that, even when I win cases, the ALJ's Order is often appealed, and thus I must wait another couple years to get paid if I ultimately win.

I've never conversed about compensation paid to employer's counsel, but I presume that they do not have to wait several years for payment. I know that there fees are not contingent; however, it may help make matters more fair if *both sides* operated under a contingent fee. Employers might not protest the clear case and appeal the supported decision if their counsel was paid only in the event of a victory.

The above is not empirical fact, but rather gut feeling from practicing black lung law. At this point I feel rather discouraged about the state of the law in this field. [SIGNATURE AND ACKNOWLEDGEMENT OMITTED]

IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA
AT CHARLESTON

Disciplinary Proceedings No. 18396

COMMITTEE ON LEGAL ETHICS OF THE
WEST VIRGINIA STATE BAR,
Complainant,

v.

GEORGE R. TRIPLETT, a member of the
West Virginia State Bar,
Respondent.

AFFIDAVIT

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, to-wit:

I, Grant Crandall, Crandall & Pyles, P. O. Box 3465, Charleston, West Virginia 25334, having been duly sworn, do hereby depose and state as follows:

1. I am a partner in the firm of Crandall & Pyles, a law firm with seven attorneys and nine staff people located in two offices, Charleston and Logan, West Virginia. My educational background includes B.A. from Grinnell College, Ph.D. from Oxford University where I was formerly a Rhoades Scholar, and J.D. from U.C.L.A. I have handled black lung cases regularly for more than thirteen years. A substantial portion of my case load is comprised of black lung cases. I am the principal author of the amicus brief filed by the UMWA in the U.S. Supreme Court in *Mullins Coal Co. v. Director,* No. 86-327 (12/14/87). I have conducted numerous seminars and training sessions on black lung and I am the author of the book *Black Lung Litigation* and am also the author

The Training Guide for Handling Black Lung Cases published by the Legal Services Corporation. I regularly advise and am associated as counsel by numerous other law firms because of my recognized expertise in black lung litigation.

2. Over the past decade the number of attorneys willing to undertake any significant number of federal black lung cases on behalf of claimants has dwindled from a fairly sizable number to approximately one dozen in the entire State of West Virginia. This fact is due to severa! factors. The cases have become increasingly hard to win and there is a long period between taking a case and the final completion of the case. Perhaps the single greatest problem from an attorney's point of view is the burdensome process of handling fee petitions in these cases. These fee petitions require substantial detail in the timekeeping aspects. Bills have to be submitted separately to the Deputy Commissioner, Administrative Law Judge, Benefits Review Board and Circuit Court of Appeals, depending the final level to which the case ultimately ascends. That means in the typical case that there are either two or three separate bills that have to be submitted. Additionally, the hourly rates typically awarded are not sufficient to make black lung practice practically attractive. On top of that is the fact that even when an Administrative Law Judge awards a certain hourly rate, the Deputy Commissioners very frequently award a lower hourly rate in the same case. The Deputy Commissioner often awards a lower hourly rate which is completely uncompetitive for contingency fee work of this nature.

3. In our law firm we periodically review the financial considerations of each of our areas of practice. Approximately two years ago we examined our black lung practice. At that time, we found that

we were not making money in the black lung practice and the situation has become even more difficult as fewer cases are now approved. We seriously considered dropping our federal black lung practice, but ultimately concluded that this would work such a substantial hardship on the people of the state that we felt morally obliged to continue federal black lung representation. We do have substantial experience in this field and we know that large numbers of West Virginians are unable to obtain competent black lung counsel, so we simply decided to remain in the field despite the fact that it is not a money-maker for our law firm. We have tried to make up for this fact by obtaining other disability cases for the same clients, but the black lung side of our practice itself has no economic incentive for continuing it.

4. The factors which make it unattractive for private attorneys to undertake claimants' representation in black lung cases have become even worse at the same time that the United Mine Workers of America has reduced the provision of legal counsel to its members with regard to these claims. The three UMWA districts in West Virginia have all experienced substantial financial difficulties in the past few years with substantial decline in their memberships and a very significant increase in the legal work responsibilities for each district. That has meant that each UMWA district has had to look much more carefully at its expenditures for legal services and the districts have become far more restrictive in handling federal black lung claims.

5. Because we continue to do a fairly sizable number of black lung claims, we are regularly sent the hearing notices by the Department of Labor, Office of Administrative Law Judges. We also attend hearings on a regular basis on behalf of our clients.

On the basis of this information we have seen that in last year or year and a half about one half of all claimants come to federal black lung hearings with no legal representation. They have indicated many times that they are unable to find any lawyer who is willing to take their case. It is my observation that many of the people without legal representation have claims that have at least reasonable legal merit. It is not simply a situation in which frivolous claims are asserted and thus lawyers are unwilling to undertake them because they have no reasonable chance of recovery. In the area of black lung practice, the West Virginia Bar appears not to have met its responsibilities in providing adequate representation to the citizens of the State. While this is understandable, given the poor economic return on such cases, I believe that the Bar ethically has a duty to assist people with these claims.

Further the affiant sayeth not. (SIGNATURE AND ACKNOWLEDGMENT OMITTED)

BEFORE THE COMMITTEE ON LEGAL ETHICS
OF THE WEST VIRGINIA STATE BAR

L.E.C. 86-056

IN RE: GEORGE R. TRIPLETT, a member
of The West Virginia State Bar,
Respondent.

Elkins Motor Lodge,
Elkins, West Virginia
Law Office of
George R. Triplett,
Elkins, West Virginia
August 3, 1987

This matter came on for hearing at 9:35 a.m., pursuant to notice, before the Subcommittee on Legal Ethics.

BEFORE: JOHN C. SKINNER, JR., ESQUIRE,
Chairman
WARREN A. THORNHILL, III, ESQUIRE
DAVID HARRIS, Lay Member

* * *

excused to leave. Thank you for coming today.

(Witness Hill excused.)

(Witness Ball sworn.)

THEREUPON came

EUNA BALL,

who was called as a witness on behalf of the Respondent and, having been first duly sworn according to law, was examined and testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. FAHRENZ:

Q Would you state your name for the record, please?

A Euna Ball.

Q Ms. Ball, where do you live?

A Monterville, West Virginia.

Q How long have you lived there?

A Well, I've lived near Monterville most of my life. I moved away for about ten (10) years and came back.

Q I understand that you are a widow; is that correct?

A Yes, I am.

Q Now, what did your husband do?

A He was a coal miner.

Q Had your husband tried to get Black Lung while he was alive, Black Lung benefits?

A Yes, he had.

Q Had he been successful?

A No.

Q Now, he died; is that correct?

A Yes.

Q What did you do at the time he died, to help you with your benefits?

A Well, they took an autopsy of him, and I had taken the papers and went to Jennifer Sargus.

Q Now, Jennifer Sargus is an attorney; is that correct?

A Correct.

Q Is she from Wheeling?

A Uh-huh.

Q And she was a Union lawyer; is that correct?

A Yes.

Q Now, the autopsy, did it show that your husband had Black Lung?

A Yes.

Q Even though he had been denied before, the autopsy showed that he had the disease?

A (Indicating affirmatively.)

Q You have to answer.

A Yes.

Q Now, will you tell the Committee, if you would, what Ms. Sargus did on your behalf?

A She worked on it a while and I got a monthly check, but then she sent me the papers and said they owed me back pay of around eight ($8,000) to nine thousand dollars ($9,000); and she said she was unable to get it and if I could get a lawyer to work on it, that she'd advise me to do so, and she sent me the papers. They came through the mail.

Q She told you that she had determined that you had a right to more benefits, that is, that they shorted you?

A Yes.

Q But she wouldn't do anything to help you get those benefits?

A That she was unable to get them.

Q Okay. What did you do then?

A Well, I got in touch with Mr. Triplett.

Q Has Mr. Triplett ever represented you before?

A No, he hadn't.

Q Were you family friends or personal acquaintances with Mr. Triplett?

A No.

Q That was the first time you had ever met Mr. Triplett?

A The first time I'd met him.

Q Okay. Will you tell the Committee, if you would, what you discussed during your first meeting with Mr. Triplett?

A We discussed trying to get my Black Lung for me.

Q To get the eight thousand dollars ($8,000)?

A Yes, eight or nine.

Q So, technically, you already had the Black Lung benefits?

A Check benefits, yes. I got a check each month.

Q So you went to consult with him about getting the eight ($8,000) or nine thousand dollars ($9,000) they had shorted you?

A Yes.

Q Did you discuss anything at that time about fees?

A Yes. I told him I'd give him twenty-five percent (25%) of what I got.

Q And he suggested that number to you, the twenty-five percent (25%)?

A Yes.

Q And you agreed to that?

A Yes, I did.

Q Now, did you ever pay Mr. Triplett any money, cash?

A I paid him cash two (2) times. I think it was a hundred and fifty (150) one time and fifty dollars ($50) one time.

MR. FAHRENZ: Ms. Dusic, could we agree that — I think our records indicate, and I don't think it's in the stipulation, that it was October 28th, 1981, of a hundred and fifty dollars ($150), and February the 18th, 1982, of fifty dollars ($50), and I believe our first representation of this client was May the 1st, 1981.

MS. DUSIC: I have no problem stipulating to that.

CHAIRMAN SKINNER: So stipulated.

BY MR. FAHRENZ:

Q Now, what did you understand that the two hundred dollars ($200) was for?

A Expenses.

Q Mr. Triplett explained that to you, too, that he would have expenses in telephone calls and records and things of that nature?

A Yes.

Q Now, did you ever receive any monies from the Department of Labor that they had previously shorted you? Did they ever pay you the money that they had shorted you?

A Yes, part of it. I still haven't gotten all of it.

Q How much did they pay you?

A It was between eight (8,000) and nine thousand (9,000). I'm not sure exactly.

Q Now, what did you do when you received the

* * *

THEREUPON came

MILFORD L. GIBSON,

who was called as a witness on behalf of the Respondent and, having been first duly sworn according to law, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. FAHRENZ:

Q For the record, would you state your name, please?

A My name is Milford L. Gibson, G-i-b-s-o-n.

Q Where do you reside, Mr. Gibson?

A 2 Ridge, R-i-d-g-e, Lane, L-a-n-e, Elkins, West Virginia.

Q What is your business, profession, or occupation?

A I'm loafing now, but for forty (40) years I practiced law in West Virginia.

Q I believe, your dad was also a lawyer?

A Uh-huh.

Q And he's a former congressman and U. S. Attorney in this district?

A He wasn't a congressman. We fell flat on

* * *

Q You were one of the Public Service Commissioners?

A I was a Commissioner.

Q So that being, pretty much, a full-time job, you lived in Charleston for that period?

A I lived in Charleston.

Q During that same period of time that you were a Public Service Commissioner, did you serve in any capacity for the West Virginia State Bar?

A Yes. I was on the — with the State Bar for seven (7) years.

Q In what capacity did you serve?

A Well, I was just a member of the Commission. I don't know how it's operating now, but the old deal, you would have five (5) to seven (7) people have a hearing.

Q You're talking about the State Legal Ethics Committee, correct?

A State Legal Ethics, yes.

Q Of the West Virginia State Bar?

A Yes.

Q Okay. Now, once you left the Public Service Commission, did you move back to Elkins?

A Yes.

Q Did you engage in private practice there?

A I did.

Q Did you take any Black Lung cases?

A Two (2).

Q Will you relate to the Committee your experience on that?

A Well, when I came out – and at that time, there were some of these cases floating around. Well, I tried one of them, because I decided that maybe I might like that kind of work. So I took a shot at it, and it worked beautifully; everything went great. So I then tried another one and it just went to hell. It didn't do – it was a mess from the beginning.

Q In regard to what?

A Well, in the first place –

MS. DUSIC: I'd like to make an objection. I don't think that how the system works is relevant, unless somehow this was discussed with Mr. Triplett and formed the basis of some decision. His experiences with Black Lung, I think, are irrelevant. As I said, I don't think the statute and the way that attorneys have had experience with it, with respect to whether they're fair or not, or anything like that, is relevant to this.

MR. FAHRENZ: Ms. Dusic answered her own objection when she stated that unless this served as a basis for later advice to Mr. Triplett, which is exactly what I'm trying to lay the foundation for.

MS. DUSIC: I think it more appropriate to ask him what advice he gave him, rather than go into a big background as to what his experiences are.

CHAIRMAN SKINNER: Well, I think we'll conditionally admit it.

MR. FAHRENZ: It goes to a specific competency.

CHAIRMAN SKINNER: Go ahead, sir.

THE WITNESS: Well, as I say, the first time it was handled, it went real well, and then I tried another one and it didn't – one time you'd have the State people working it and the next time you had the Federal people, and there was always some little thing between those deals and it was just aggravating. So I never went in for any more of them.

BY MR. FAHRENZ:

Q So your first experience was with the State?

A With the State; and what they said at that time, you handled your case and you did it for, I think it was, twenty-five percent (25%) of the amount you got. And on the next one, it was a Federal one and every time – well, not every time, but most of the time, you'd come in, you'd get your case lined up, you'd get it ready, and then it was there on your desk and you could – well, it was just one of those – you could take it and put it someplace or you could – they didn't – they never seemed to close the case. They'd say, now hold this to a certain time, and It went that way. So it got to the place that I just, as I said, I just – I wouldn't fool with it.

Q Is it safe to say that you had trouble dealing with the Federal bureaucracy?

A Yes.

Q Now, I take it, you do know George Triplett?

A Yes.

Q How did you come to know Mr. Triplett?

A I found him standing on the road up here next to the courthouse one time, when I was out of the U. S. Attorney's Office and he was just getting cranked up.

* * *

at 2:30 p.m., the proceedings continued as follows:)

(Witness Miller sworn.)

THEREUPON came

WILLIAM M. MILLER,

who was called as a witness on behalf of the Respondent and, having been first duly sworn according to law, was examined and testified upon his oath af follows:

DIRECT EXAMINATION

BY MR. FAHRENZ:

Q Would you state your name for the record, please, sir?

A William M. Miller.

Q Do you have a nickname, Mr. Miller?

A Yes. Mont.

Q Where do you reside, Mr. Miller?

A 303 Walnut Street, Parsons.

Q How long have you lived there?

A About eight (8) years.

Q What is your business, profession, or occupation?

A I'm an attorney.

Q Do you hold any public position in Tucker County?

A Prosecuting Attorney in Tucker County.

Q And how long have you been the prosecuting attorney?

A Going on seven (7) years.

Q Do you know George Triplett?

A Yes, I do.

Q How did you come to know Mr. Triplett?

A Mostly through cases. I prosecuted them and George would defend them.

Q In your observations of Mr. Triplett, how would he represent his client?

A George would do a good job for his client. I always hated to get George on the other side, usually, because he would drive me crazy either with paperwork or phone calls, one or the other. George was, I would say, one of the better defense attorneys in the area.

Q Do you ever know of him intentionally misrepresenting or misstating facts to you?

A No.

Q Do you ever know of him committing any

* * *

Q In an honest and ethical manner?

A Yes; but sometimes, you know, that can bug you a little bit.

Q Would you agree that he's tenacious?

A Yes, very much so.

Q Did you read in the newspapers that George had been charged with ethical violations?

A Yes, I did.

Q That was publicized in your area, too?

A Yes, it was. We get the Elkins Inter-Mountain. That's the only daily paper we get.

Q And did that change your opinion as to George Triplett's reputation?

A No, it didn't.

Q Do you presently handle cases for the Department of Labor?

A Yes, I do.

Q What has been your experiences with it?

MS. DUSIC: Objection as to the relevancy.

MR. FAHRENZ: It goes to mitigation.

CHAIRMAN SKINNER: It's offered only for that purpose?

MR. FAHRENZ: Correct.

CHAIRMAN SKINNER: Okay, then we'll admit it. You can answer.

THE WITNESS: The problem I've had, I've represented probably seven (7) or eight (8) cases and won three (3) or four (4) and I've never been paid in any of them. I had to look at them this way. Being a prosecutor is kind of a public official. You know, I try to take the cases, but with no expectation anymore of being paid.

I think I won my first one in 1980. I think my client got thirty-some thousand dollars, and I never got paid; and after about two hundred dollars ($200) worth of

phone calls and mail to Washington, I gave up and just decided to forget it.

MR. FAHRENZ: I have no further questions.

CHAIRMAN SKINNER: Cross?

CROSS-EXAMINATION

BY MS. DUSIC:

Q Mr. Miller, I am Sherri Dusic. I'm an attorney with the State Bar. Do you have personal knowledge of the facts underlying the statement of charges?

MR. FAHRENZ: No questions for us.

MS. DUSIC: Nothing.

CHAIRMAN SKINNER: Any reason to retain this witness?

MR. FAHRENZ: He's got a long drive. I'd say, good luck and be careful.

CHAIRMAN SKINNER: You may be excused. Thank you for coming.

(Witness Miller excused.)

(Witness Cain sworn.)

THEREUPON came

JAMES F. CAIN,

who was called as a witness on behalf of the Respondent and, having been first duly sworn according to law, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. FAHRENZ:

Q Would you state your name, please, sir?

A James F. Cain.

Q Mr. Cain, were do you reside?

A I reside in Elkins, West Virginia.

Q What is your business, profession, or occupation?

A I'm an attorney at law and I'm also the prosecuting attorney of this county.

Q How long have you been admitted to practice?

A Since 1963.

Q And how long have you been the prosecuting attorney of this county?

A Since 1965.

Q I take it, then, you have been prosecuting attorney both when Mr. Triplett wore a black robe and when he was on the other side of counsel table?

A That is correct.

Q How long have you known Mr. Triplett, I should ask?

A I've known Mr. Triplett all of his life, or the best portion of it. We were in college together and law school together, and I think I first knew Mr. Triplett along about high school time.

Q Did you engage in any athletic events together?

A Yes, sir. We were on the Davis and Elkins College football team in 1955.

* * *

Q And you were aware of that? It was in the Elkins newspaper?

A Yes, sir.

Q Did that change your opinion as to Mr. Triplett's character traits?

A No, sir.

MR. FAHRENZ: No further questions.

CROSS-EXAMINATION

BY MS. DUSIC:

Q Mr. Cain, I'm Sherri Dusic. I'm counsel with the State Bar. So you're saying that you have no personal knowledge about the facts underlying the statement of charges; is that correct?

A No, no personal knowledge.

Q Are you a full-time prosecutor, or do you have a private practice?

A We have a private practice, also, but it's somewhat limited by virtue of the office; but all of West Virginia, with the exception of the larger counties, are part-time prosecutors.

Q Do you have any experience, yourself, with Black Lung work?

A I've had a couple of cases. They were a long time ago, and the reason I don't take Black Lung cases anymore is because of the difficulty that we've had in getting fees.

Q How long ago did you have Black Lung cases?

A The first one I had was back in the early sixties ('60's), the mid sixties ('60's), or maybe the early seventies ('70's); and then the second one started in '72 and finally wound up in '80, I believe, or thereabouts, and that's how long it took to get through.

Q Did you file fee petitions?

A Yes, ma'am.

Q How did you know to file fee petitions?

A Well, because – when they first started out, I don't believe you had to do that, but then they changed the rule, somewhere along between early 1970 and 1980, to require fee petitions to be filed.

But the only two (2) cases I had – I had three (3) cases and I filed fee petitions in all of them; and one (1) case, and the reason I don't take them anymore, twice it went to the Benefits Review Board in Washington, the same case. The first time, they denied the fee petition all the way through the Labor Department, and I appealed clear to the Benefits Review Board in Washington, and they granted it and they still wouldn't pay the thing. So we had to go back through the process again and get a second approval.

Q When you say "they," who was supposed to be paying the fee? Was there an employer in this case?

A Well, there was a question as to who pays the fee, but I believe the client was ultimately responsible for it, at least the old Regulations, but the government has to approve it, as I understand it, the Labor Department, and they did not approve it.

They approved the fee petition in the one case without any trouble. In the second case, it was terribly difficult. As I say, twice it went to the Benefits Review Board, and there was a published opinion on the case;

and after that, I just frankly – it was an eighteen-hundred-dollar ($1,800) fee, and my time, on my own part of it, and the time that I expended on the case, was far more than what we ever got from it, ten (10) years of legal work, too.

Q Did you ever enter into a contingency fee

* * *

Supreme Court, U.S.
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No. 88-1671

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF LABOR, PETIT

v.

GEORGE R. TRIPLETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY MEMORANDUM FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY MEMORANDUM FOR THE PETITIONER

In opposing certiorari, respondent essentially repeats the reasoning of the court below in support of its holding that the black lung attorney's fee provisions, as applied, violate the Due Process Clause of the Fifth Amendment. As we showed in our petition, that reasoning is flawed, and respondent furnishes no new or satisfactory answers to our arguments. Tellingly, respondent never disputes our submission (Pet. 11) that the court decided an important question of federal law warranting this Court's review. Nor does respondent seriously disagree (Pet. 21-24) that the decision below threatens to undermine protection for black lung claimants against overreaching by attorneys—a danger that all agree Congress intended to avoid.*

* Respondent weakly suggests (Br. in Opp. 4) that existing state bar rules are in themselves adequate to protect any interest the government has against overreaching fee agreements, but respondent's exoneration in this very case—in which he threatened the depletion of

Respondent apparently defends the failure of the court below to give proper deference to Congress's regulation of black lung attorney's fees on the ground that the statutory system here was challenged "as applied," not on its face. Br. in Opp. 2-3. That argument, however, ignores this Court's approach in *Mathews* v. *Eldridge,* 424 U.S. 319, 349 (1976)—one of the principal decisions that *Walters* v. *National Association of Radiation Survivors,* 473 U.S. 305, 320 (1985), cited to illustrate the deference required in procedural due process cases. In *Mathews,* as here, the challenge was to statutory procedures "as applied" by the responsible agency. Nevertheless, in rejecting a due process claim that administrators were required to afford an evidentiary hearing before terminating Social Security benefits, the Court stressed that "[i]n assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." 424 U.S. at 349. The same deference should have been accorded here to the good-faith judgments of the Department of Labor, which is charged with the regulation of black lung fees, but the court failed to do so in its haste to free West Virginia attorneys from federal fee regulation.

Respondent also insists at length (Br. in Opp. 4-16) that the court below correctly applied the factors relevant to a procedural due process challenge under *Walters* and *Mathews.* But respondent simply reiterates the same errors as those we identified in the court's opinion: cavalier devaluation of the government's interest in regulating fees (Pet. 13-16); speculation that attorneys are genuinely unavailable under the current fee regime, coupled with an unsupported assertion that the fee system bears responsibility for any attorney shortage (Pet. 16-18); and equation of the disability benefits at issue here with the subsistence welfare benefits found to carry unusually heavy weight in other due process contexts (Pet. 20).

claimants' benefits by entering into contingent fee agreements in direct violation of the statute and regulations—refutes that notion. See also Pet. 23 (discussing past problems with unsupervised black lung fee arrangements).

Respondent next argues (Br. in Opp. 16-17) that the anecdotal record below was sufficient to support the court's condemnation of the federal regulation of attorney's fees in thousands of cases across West Virginia. Perhaps the best refutation of respondent's own point is the fact that he is able to reprint in his forty-five page appendix virtually all of the "evidence" on which the court relied (Br. in Opp. App. A1-A45)—material consisting of a few affidavits sent to the West Virginia Court of Appeals and testimony taken in respondent's disciplinary hearing (where the constitutionality of the fee system was not in issue). That material, added to isolated statements made in congressional hearings, hardly composes a record that can sustain the court's broad holdings about the operation and effect of federal fee regulation on attorneys who represent black lung claimants.

Even that modest record undermines the court's conclusions in ways with which respondent never comes to grips. The Department of Labor's figures showed a 92% representation rate in certain ALJ cases (see Pet. 10), a point that respondent ignores by referring (Br. in Opp. 14) only to the lower success rate of the small fraction of unrepresented claimants. Likewise, respondent never accounts for the impact of the low, but congressionally intended, 5% approval rate for black lung claims on the attractiveness of black lung cases to lawyers (see Pet. 17-18)—even though the attorney affidavits submitted to the court below prominently cite that low approval rate as a key consideration in the reduced attorney interest in black lung cases. See Br. in

Opp. App. A3-A4, A11-A12, A24, A27, A30. And in his complaints about the current fee system (Br. in Opp. 4-5, 15-16), respondent, like the court, overlooks the fact that the hourly component of an attorney's fee award can already take into account the delay in payment, as well as the risk of loss. See Pet. 16 n.5. Cf. *Missouri* v. *Jenkins*, No. 88-64 (June 19, 1989), slip op. 8-9 (recognizing that adjustments in hourly rates can compensate for delay in payment).

Finally, respondent devotes considerable energy to demonstrating a point not in issue here—the complexity of some aspects of black lung cases, and the consequent value of having an attorney. See Br. in Opp. 8-16. Of course, an attorney can be useful in aspects of the black lung claims process; our disagreement with respondent and the court below lies in their unwarranted inferences that an attorney is an essential component of due process at all stages of the black lung claims procedure and that the attorney's fee system is so flawed as to bear the blame for any attorney shortages.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor
Department of Labor

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Nos. 88-1671 and 88-1688

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In the Supreme Court of the United States

OCTOBER TERM, 1989

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COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR THE FEDERAL PETITIONER

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QUESTION PRESENTED

Whether the attorney's fee provisions of the Black Lung Benefits Act, as applied, violate the Due Process Clause of the Fifth Amendment by denying claimants access to counsel.

PARTIES TO THE PROCEEDING

The petitioner in No. 88-1671 is the United States Department of Labor, intervenor below. The petitioner in No. 88-1688 is the Committee on Legal Ethics of the West Virginia State Bar, the petitioner below. George R. Triplett, the respondent below, is the respondent in this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1671

UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

No. 88-1688

COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR THE FEDERAL PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Appeals (Pet. App. 1a-32a), was originally reported at 376 S.E.2d 818. It was subsequently withdrawn and reported as

corrected, with a dissenting opinion (Pet. App. 33a-36a) and an opinion on the denial of rehearing (Pet. App. 37a-41a), at 378 S.E.2d 82 The Findings of Fact, Conclusions of Law, and Recommendation Concerning Discipline of the Committee on Legal Ethics of the West Virginia State Bar (Pet. App. 42a-51a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Appeals was entered October 26, 1988. A petition for rehearing was denied on December 21, 1988 (Pet. App. 52a). On March 14, 1989, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including April 20, 1989. The petitions for certiorari were filed on April 12, 1989 (No. 88-1671) and April 18, 1989 (No. 88-1688), and granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a) (1982 & Supp. V 1987), incorporating various provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), and Section 28 of the LHWCA, 33 U.S.C. 928 (1982 & Supp. V (1987), which is one of the provisions so incorporated, are set forth in the appendix to the Department of Labor's petition (88-1671 Pet. App. 53a-56a).

The Department of Labor's regulations governing the payment of claimants' attorney's fees in black lung cases, 20 C.F.R. 725.365-725.367, are also set forth in that appendix (Pet. App. 57a-60a).

STATEMENT

1. The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* (1982 & Supp. V 1987), "provides benefits to those who have become totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment," and to their eligible survivors. *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414, 417 (1988). Claims for benefits are determined administratively under the auspices of the Department of Labor. 30 U.S.C. 932 (1982 & Supp. V 1987); 20 C.F.R. 725.350.[1] A claimant may be represented "in any proceeding for determination of a claim" by a qualified representative, including an attorney. 20 C.F.R. 725.362, 725.363. As part of its protection for eligible beneficiaries, the Act, through its incorporation of provisions of the Longshore and Harbor Workers Compensation Act (LHWCA), regulates the payment of fees for a claimant's attorney. See 30 U.S.C. 932(a) (1982 & Supp. V 1987) (incorporating, *inter alia*, 33 U.S.C. 928 (1982 & Supp. V (1987)). The Department of Labor has also issued comprehensive regulations governing the award of attorney's fees. 20 C.F.R. 725.362-725.367.

Under the Act and the Department of Labor's regulations, an attorney for a black lung claimant is pro-

[1] Black lung claims filed between July 1 and December 31, 1973 (transitional claims), and claims filed after December 31, 1973 (Part C claims) are administered by the Department of Labor. See 30 U.S.C. 925, 931-932 (1982 & Supp. V 1987). A temporary program of federally funded benefits for claims filed before July 1, 1973 (Part B), was administered by the Secretary of Health, Education and Welfare. See 30 U.S.C. 921-924 (1982 & Supp. V 1987); 20 C.F.R. 725.1(b). See *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 138-139 (1987).

hibited from charging a fee unless the fee has been approved by the appropriate agency or court. 33 U.S.C. 928(c); 20 C.F.R. 725.365. The regulations also provide that "[n]o contract or prior agreement for a fee shall be valid." 20 C.F.R. 725.365, 725.362 (a). See also 20 C.F.R. 802.203(f) (Benefits Review Board regulation). When the claimant does not prevail in his effort to secure benefits, no fee is approved. See *General Dynamics Corp.* v. *Horrigan*, 848 F.2d 321 (1st Cir.) (applying LHWCA), cert. denied, 109 S. Ct. 554 (1988); *Director, OWCP* v. *Hemingway Transp. Inc.*, 1 Ben. Rev. Bd. Serv. (MB) 73 (Ben. Rev. Bd. 1974). When the claimant does prevail in a contested case, the coal mine operator, its insurance carrier, or, in certain instances, the Black Lung Disability Trust Fund pays "a reasonable attorney's fee."[2] 30 U.S.C. 932(a) (1982 & Supp. V 1987) (incorporating 33 U.S.C. 928(a)), 932(j); see 20 C.F.R. 725.367.

The black lung regulations establish the procedures for applying for a fee and the criteria for its award. See 20 C.F.R. 725.366. The application must itemize the work done and note "the customary billing rate" of the person who performed it. *Ibid.* An approved fee "shall be reasonably commensurate with the necessary work done." 20 C.F.R. 725.366(b). The regulation identifies as factors to be taken into account in setting a fee "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to

[2] The Black Lung Disability Trust Fund is a Treasury account financed by the coal-mining industry through an excise tax on coal. The Trust Fund is administered by the Director of the Office of Workers' Compensation Programs in the Department of Labor. See 30 U.S.C. 934; 26 U.S.C. 4121(a), 9501 (1982 & Supp. V 1987).

which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested." *Ibid.* See also 20 C.F.R. 802.203(d) and (e) (Benefits Review Board provisions).

An award of attorney's fees is not enforceable until the claimant receives a final award of benefits. 33 U.S.C. 928(a). A claim for benefits is first submitted to a Department of Labor deputy commissioner for an initial determination. 20 C.F.R. 725.401-725.420. Any party dissatisfied with the deputy commissioner's determination can request a de novo hearing before an administrative law judge (ALJ). 20 C.F.R. 725.419(a), 725.421. The ALJ's decision is subject to review by the Benefits Review Board. Review of that decision, in turn, is available in a court of appeals. 30 U.S.C. 932(a) (1982 & Supp. V 1987) incorporating, *inter alia*, 33 U.S.C. 921(c); 20 C.F.R. 725.481, 725.482.

An attorney must apply for fees separately to the "deputy commissioner, administrative law judge, or appropriate appellate tribunal" before whom the services were performed. 20 C.F.R. 725.366(a). An approved fee "shall be paid promptly and directly by the operator or carrier to the claimant's attorney in a lump sum after the order becomes final." 20 C.F.R. 725.367(a). The fee award does not bear post-judgment interest pending an appeal. See *Hobbs* v. *Director, OWCP*, 820 F.2d 1528, 1530-1531 (9th Cir. 1987) (applying LHWCA). Nevertheless, the attorney's possible delay in being paid, as well as his risk of loss, are assumed to be reflected in his hourly rates. *Id.* at 1529 (delay); *Thompson* v. *Potashnick Constr. Co.*, 812 F.2d 574, 577 (9th Cir. 1987) (describing Board policy under LHWCA regarding delay and risk of loss).

2. Beginning in 1978, respondent, a West Virginia lawyer, entered into contingent fee agreements with sixteen black lung claimants. These agreements entitled him to 25% of the back benefits recovered by the claimants as a result of his representation.[3] Between 1978 and 1983, claimants represented by respondent were awarded benefits, and he collected fees under the contingent fee arrangments. These fees were never approved by the appropriate agency or court; as a result, the fees were collected in violation of both the statute and governing regulations. Pet. App. 2a, 46a-49a; see 33 U S.C. 928(c); 20 C.F.R. 725.365.

In 1987, the Committee on Legal Ethics of the West Virginia State Bar initiated a disciplinary proceeding against respondent based on his violations of the Department's fee regulations. Following a hearing, the Committee found respondent to have engaged in professional misconduct. Pet. App. 42a-44a. The misconduct consisted of "[h]is failure to abide by the [Department] regulation," a failure that constituted, among other things, "conduct that is prejudicial to the administration of justice" and that "adversely reflects on his fitness to practice law." *Id.* at 50a (citing West Virginia Code of Professional Responsibility DR 1-102(A)(4), (5), and (6) (1982)). The Committee filed a complaint in the Supreme Court of Appeals of West Virginia to enforce a recommended six-month suspension. Pet. App. 1a.

[3] A claimant, when found eligible for benefits, receives a lump sum representing past due benefits from the onset of disability to the date of the award. In addition, claimants receive future benefits, paid monthly, after they are determined to be eligible. 20 C.F.R. 725.502.

3. a. A divided Supreme Court of Appeals denied enforcement. Pet. App. 1a-32a. Although respondent had not challenged the black lung fee system on constitutional grounds, the court concluded, *sua sponte*, that the fee system violates the Due Process Clause. The court reasoned that the provisions for awarding attorney's fees under the black lung statute and the Department's regulations, as applied, "severely restrict [black lung] claimants' ability to find competent lawyers to represent them." *Id.* at 24a. Consequently, the court found, claimants are denied adequate procedural protection of their property interest in the continued receipt of black lung benefits. The court concluded that because the attorney's fee limitations were unconstitutional, respondent's failure to comply with the Department's regulations did not violate West Virginia ethical rules.[4] *Id.* at 30a.

The court acknowledged that the Department's regulations "appear[] to provide for attorneys' fees that will fairly compensate competent counsel," but it nevertheless stated that "the factual record before us reveals that this is not the case." Pet. App. 16a. That record consisted solely of the affidavits of five attorneys submitted to the court as attachments to an amicus brief, excerpts from testimony below, and statements by attorneys before a House of Representatives Subcommittee in 1985. *Id.* at 17a-20a (citing *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Standards*

[4] The court rejected the Committee's charge in its complaint that Triplett had misrepresented his fee arrangements to the Department, finding that the Committee had not adequately alleged such a violation and that the evidence did not support it in any event. Pet. App. 5a-6a.

of the House Comm. on Education and Labor, 99th Cong., 1st Sess. (1985)). See also Br. in Opp. App. A36-A45 (testimony at disciplinary hearing).

Based on that record, the court determined that the fee provisions manifested two inadequacies that deter "most" attorneys from taking on black lung cases. Those problems were "the long delay in payment, without any provision for interest, and the lack of premiums to offset the contingent nature of the work." The court added that the contingency factor had assumed greater importance as approval rates "steadily declined" under the tighter eligibility criteria of the 1981 amendments to the black lung statute. The court cited an approval rate of 22.7% for claimants whose cases went before an ALJ and a 5.8% overall rate under the 1981 amendments. The low approval rate, the court believed, established "not only the necessity of lawyer representation, but [also] the substantial risk that a lawyer will receive no fee at all for his work." Pet. App. 20a.

The court then evaluated the attorney's fee system under the three-factor test articulated by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305 (1985). Pet. App. 20a-24a. Applying that test, this Court in *Walters* upheld Congress's $10 fee limitation for attorneys in Veterans' Administration (VA) benefits proceedings in the face of a due process challenge. The court here applied the *Mathews* factors to reach the opposite result.

As to the first factor, the court identified two government interests in the regulation of fees in the black lung program: (1) the fee approval requirement serves "to ensure that neither the responsible operator nor the Trust Fund will be overcharged"; and (2) the prohibition of private fee agreements serves "to protect claimants from improvident agreements that needlessly deplete their benefits." Pet. App. 21a. The court discounted these interests, however, because of its view that the fee system in operation has made lawyers "almost entirely unavailable to claimants." The result, in the court's view, was that "under the current system the claimant seldom has an award to share." *Ibid.*

Turning to the second factor, the probability of error under the current system and the likely value of additional procedures, the court surmised that the absence of counsel poses a serious risk of an erroneous result. Although acknowledging that it lacked statistics comparing the success rates of black lung claimants with and without counsel, the court asserted that the "black lung claims process is procedurally, factually and legally complex," and that "lawyer representation is virtually essential to prevent erroneous deprivations of benefits for victims of black lung." Pet. App. 22a-23a.

Finally, the court evaluated the weight of the private interests at stake. The court noted that in *Walters*, this Court had emphasized that VA benefits are awarded on the basis of disability rather than need, which reduced their weight in the analysis of the process that was due. Pet. App. 23a. Although black lung benefits are likewise awarded on the basis of disability, not need, the court below concluded that the interest in obtaining black lung benefits deserved a weight comparable to the strong interest, recognized in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), in

retaining subsistence welfare benefits. Pet. App. 23a-24a.

Considering those factors, the court concluded that "the system as currently administered denies claimants for black lung benefits property without due process of law by severely restricting their right to obtain representation by competent counsel." Pet. App. 28a; *id.* at 24a. The court also relied on an "independent" due process theory for invalidating the fee system: the fee system effectively denies "qualified claimants the procedural safeguards provided by Congress that are essential to vindicate the right to benefits also granted by Congress." *Id.* at 25a. The court found it "fundamentally unfair" for the government "to confer a right with one hand, and take it away with the other hand." *Id.* at 24a.[5]

b. Two justices dissented. Pet. App. 33a-36a. The dissenters stated that the majority had resolved a constitutional question never raised below, and, as a consequence, "there is no factual record developed." *Id.* at 33a. In particular, the dissent contended that "[t]he ex parte affidavits" of attorneys practicing in the black lung field were "woefully inadequate" to sustain the majority's finding that the black lung fee system deprived claimants of access to counsel. *Ibid.*

4. Recognizing that its decision "involved an important question of federal law," the majority invited the Department of Labor to intervene as a party. Pet. App. 30a. In response, the Department

[5] Although not purporting to direct the Department of Labor to adopt any particular fee regulations, the court suggested that the Department "could provide for a contingent fee," or could use a "multiplier * * * to enhance the 'normal' hourly fee to compensate for the risk of loss." Pet. App. 25a.

of Labor intervened, supplemented the record, and petitioned for rehearing; however, the petition for rehearing was denied. *Id.* at 37a-41a. In a brief opinion, the court rejected the Department's arguments that the fee system advances important government interests and does not unduly hinder black lung claimants in obtaining counsel.

As to the factual record, the Department presented statistics regarding the outcome of recent black lung cases presented before ALJs. The statistics indicated that claimants had representatives in 92% of cases resulting in an ALJ's award or denial of benefits. These claimants prevailed 29% of the time. In the remaining 8% of cases, the claimants proceeded pro se, and prevailed 11.6% of the time. Without commenting on the overwhelming rate of representation at the ALJ level as evidenced by these figures, the court read the statistics to mean only that claimants with counsel "have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se*." Thus, the court concluded, the Department "has simply reinforced with more elaborate statistics the conclusion that we reached in the original opinion—namely, that a claimant's chance of prevailing when he is represented by counsel is substantially higher than when he appears *pro se*." Pet. App. 40a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The system for awarding attorney's fees in the black lung program does not violate the procedural due process rights of claimants. In reaching the contrary conclusion, the court below misapplied the due process analysis set forth in *Mathews* v. *Eldridge*,

424 U.S. 319, 349 (1976), and used in *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 319-320 (1985). In *Walters*, this Court held that the $10 limitation on fees for an attorney in VA benefits proceedings was consistent with procedural due process. Applying the analysis of *Mathews* and *Walters*, and giving due deference to Congress's purposes in enacting the black lung program and to the actions of the Department of Labor in administering it, the same conclusion follows here.

A. In addressing procedural due process claims, statutory procedures as well as those formulated by the administrative agencies are presumed to be constitutional. The black lung program, a massive administrative enterprise, triggers both grounds for deference. Congress determined to regulate black lung attorney's fees and entrusted administration of the black lung program to the Department of Labor. Substantial weight attaches both to Congress's policy choice—to protect black lung claimants against sharing an award with an attorney—and to the Department of Labor's considered judgment that the program is being administered fairly. At a minimum, therefore, it would take a substantial evidentiary showing of the inadequacy of the current fee system to warrant a holding that the system unconstitutionally denies claimants access to counsel. The court below, however, failed to apply those principles and consequently erred in its due process analysis.

B. The touchstone of procedural due process is "fundamental fairness," *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24 (1981), in providing "an opportunity [to be heard] at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*,

380 U.S. 545, 552 (1965). Three distinct factors bear on the adequacy of a particular procedure: (1) the private interest that will be affected, (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional or alternative procedural safeguards, and (3) the government's interest in adhering to the present system, including the fiscal and administrative burdens the additional requirements would entail. *Mathews*, 424 U.S. at 335. While recipients of black lung benefits have a "property" interest in continuing to receive benefits to which they are entitled under the statute, this interest is adequately protected under the current system.

1. The black lung fee system provides for an agency-approved award of a reasonable attorney's fee to a prevailing claimant's counsel, shifted to the payor of benefits. The award becomes enforceable when a benefits award is final. 30 U.S.C. 932(a) (1982 & Supp. V 1987) (incorporating 33 U.S.C. 928(c)); 20 C.F.R. 725.362-725.367. The policy underlying those provisions is entitled to great weight. Congress's purpose in regulating claimants' attorney's fees is to protect black lung claimants from improvident agreements that needlessly deplete their benefits. The court below, however, failed to credit the importance of that policy. It also ignored the increased cost to the government and complication of administrative proceedings that would result from a systematic effort to increase attorney's fees.

2. The second *Mathews* factor is the risk of an erroneous result under the procedures currently being used, and the probable value of other procedural safeguards. Under *Walters*, 473 U.S. at 326, it would take an "extraordinarily strong showing" on these

points to establish the unconstitutionality of the black lung fee regulation system. No such showing was made here.

The court's pivotal finding—that the fee system has produced a shortage of lawyers for black lung cases—lacks any adequate foundation in the record. The record contains no statistics about the rate of representation, other than the Department of Labor's showing that 92% of claimants receiving an award or denial of benefits from an ALJ were represented. The court relied on several statements by attorneys that the compensation in the black lung program was inadequate, but such self-serving "anecdotal evidence" cannot sustain findings about the operation of vast federal programs. Even assuming that attorneys are presently unavailable for substantial numbers of claimants, the court overrated the probable value of changes to the attorney's fee system as a corrective measure.

A variety of procedures in the current program protect pro se claimants from an erroneous denial of benefits. Most importantly, deputy commissioners must assist claimants in gathering evidence; ALJs must ensure that a pro se claimant can adequately proceed without counsel; and the Benefits Review Board will independently review the record, without requiring pro se claimants to file a brief. Although the black lung program is not intended to function as informally as the VA benefits system at issue in *Walters*, existing procedures substantially cushion the difficulties that pro se claimants might otherwise encounter in seeking black lung benefits.

This Court's cases establish that access to the services of a lawyer—whether retained or appointed—is not essential in all cases in order to ensure a fair

proceeding. When the interest at stake is an entitlement to government benefits—even one that qualifies as "property"—the Court has never held that due process requires the presence of counsel in a particular proceeding in order to guarantee fundamental fairness. In *Walters*, the Court specifically rejected the contention that the Fifth Amendment entitles a claimant in a VA benefits proceeding to pay for counsel with his own funds. Against that background, the court below clearly erred in concluding that black lung proceedings are, across-the-board, constitutionally inadequate absent the presence of counsel.

3. *Mathews*' third and final factor is the private interest affected. Here, as in *Mathews* and *Walters*, the interest is in retaining disability benefits. Unlike the subsistence welfare benefits involved in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), such disability entitlements are not awarded on the basis of indigence and are complemented by other forms of government aid; accordingly, they do not carry compelling weight in the due process analysis.

4. Applying the three *Mathews* factors, the balance decidedly tips in favor of the black lung fee system's constitutionality. The governmental interest is important, while changes to the attorney's fee system would be both administratively difficult to effect as well as costly. Moreover, current procedures contain adequate safeguards to protect pro se claimants. Finally, the claimants' interest in the receipt of non-subsistence disability benefits does not require invalidation of the fee regime as a means of enticing attorneys to enter (or remain involved in) the system.

C. The court below suggested, almost in passing, an alternative theory of due process that the fee system is invalid because it "effectively denies claimants the

right to benefits granted by Congress," which the court believed to be "fundamentally unfair." Pet. App. 24a. That analysis is flawed. To the extent that benefits conferred by Congress are protected by the Fifth Amendment, the measure of the process that is due is defined by consideration of the *Mathews* factors.

Respondent also argues that black lung claimants have a liberty interest in consulting with counsel about a claim. Br. in Opp. 6. Any such "liberty" interest, however, is coextensive with the claimant's interest in effectively presenting a claim for black lung benefits. Cf. *Walters*, 473 U.S. at 335. Consequently, the asserted liberty interest in retaining counsel has no "independent significance," *ibid.*, and does not enhance the underlying due process "property" claim.

ARGUMENT

A. The Department of Labor's Attorney's Fee Regulations, As Applied, Are Presumed To Be Constitutional, And That Presumption Is Not Overcome Absent A Substantial Showing That The Black Lung Program Inadequately Protects The Due Process Rights of Claimants

An Act of Congress challenged on procedural due process grounds is presumed to be constitutional, and a challenger bears the heavy burden of demonstrating its unconstitutionality. See *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 319-320 (1985); cf. *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). The Court has applied a similar presumption of constitutionality in reviewing procedural due process challenges to procedures formulated and applied by administrative

agencies. *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976); *Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982). That deference flows from the recognition that "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." *Mathews*, 424 U.S. at 349.

The constitutional adequacy of the black lung attorney's fee system must be judged in light of these principles. The black lung program is of considerable dimensions. At the time of enactment of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, Tit. IV, 83 Stat. 792-798, Congress anticipated that there would be approximately 100,000 afflicted miners. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 n.1 (1976). As of December 31, 1974, however, more than one-half million benefits claims had been filed under the temporary Part B provisions administered by the Department of Health, Education, and Welfare (see note 1, *supra*). 428 U.S. at 8 n.7. After major amendments to the statute in 1978, the Department of Labor experienced a surge in the number of filed claims.[6] This resulted in part from Congress's direction to reopen claims that had been denied before the effective date of the 1978 amendments. See 30 U.S.C. 945. The 1978 amendments also dramatically enhanced the rate of approval of claims, see Lopatto, *The Federal Black*

[6] In 1978, Congress amended the Black Lung Benefits Act, Pub. L. No. 92-303, 86 Stat. 150, by enacting the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11, and the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95.

Lung Program: A 1983 Primer, 85 W. Va. L. Rev. 677, 693 (1983), and resulted in severe backlogs in their processing. See *Report to the Honorable Donald J. Pease, House of Representatives, by the U.S. General Accounting Office, Adjudication of Black Lung Claims by Labor's Office of Administrative Law Judges and Benefits Review Board* App. I, at 7 (Oct. 26, 1984) (1978 amendments to the black lung statute required the reopening of about 200,000 claims).

In 1981, Congress responded to these problems by tightening the eligibility criteria applicable to post-1981 claims. The Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, §§ 202(a), 203(b), 95 Stat. 1643, repealed, among other things, three statutory presumptions in favor of claimants, a provision for benefits where a miner's death was not due to pneumoconiosis, and a prohibition on the rereading of certain x-rays. See 127 Cong. Rec. 31,747-31,748 (1981). In enacting those changes, Congress considered two General Accounting Office reports indicating that more than 80 percent of black lung claims approved under prior law "were based on inadequate or conflicting medical evidence." *Id.* at 31,977-31,978 (remarks of Sen. Hatch). The 1981 amendments were intended to "restor[e] [the black lung program] as a disability program, and no longer a pension program." *Id.* at 31,978. Under the 1981 amendments, Congress contemplated a drastically reduced approval rate "in the neighborhood of 4 percent." *Id.* at 31,979 (remarks of Sen. Nickles). In light of Congress's deliberate decision to impose more stringent criteria for black lung benefits, and considering the processing backlogs that the program has experienced, it is no surprise that some attorneys have found it not worthwhile to represent black lung claimants. The court

below, however, determined that black lung attorneys were nearly unavailable in West Virginia, and assigned the responsibility for that situation, virtually entirely, to the system for awarding attorney's fees.

The court's process of analysis is incompatible with a proper approach to judging the constitutional adequacy of a large-scale federal program. The decision to regulate black lung attorney's fees belongs to Congress, see 33 U.S.C. 928(a), and that body has entrusted the administration of the fee system to the Department of Labor, 30 U.S.C. 932(a), 936(a) (1982 & Supp. V 1987). Those legislative actions should have led the court below to give substantial weight to Congress's policy choice—to protect black lung claimants against the payment of attorney's fees (*Walters*, 473 U.S. at 326)—and to accord deference to the Department of Labor's judgment that the program is being administered fairly (*Mathews*, 424 U.S. at 349). At a minimum, that deference should have entailed an insistence that a substantial evidentiary showing of the current system's inadequacy be made before concluding that it unconstitutionally denies claimants access to counsel. Cf. *Walters*, 473 U.S. at 330.

On several different levels, however, the court's approach departed from those principles. The court gave little or no credence to the policy adopted by Congress to regulate fees. It relied on anecdotal evidence, compiled for the first time at the appellate level, to conclude that the attorney's fee system discourages attorneys from representing black lung claimants. And it found, without review of any particular black lung proceeding or any discussion of the law regarding the right to counsel, that the presence of an attorney is at all times a necessary component of due process to protect the rights of claimants. The

deficiencies in the evidentiary record alone would require rejection of the court's conclusions. Cf. *Schweiker* v. *McClure*, 456 U.S. at 196 n.10. However, as we show below, the court's incorrect approach also resulted in misapplication of the established framework for analyzing due process claims.

B. Applying Principles of Deference, And the *Mathews* v. *Eldridge* Balancing Test, The Black Lung Fee System, As Applied, Does Not Violate the Due Process Clause

The touchstone of procedural due process is "fundamental fairness," *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24 (1981), in providing "an opportunity [to be heard] at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). The initial step in the due process inquiry is to identify the interest that the Constitution is alleged to protect. We agree with the court below (Pet. App. 23a) that current recipients of black lung benefits have a protected "property" interest in continuing to receive benefits to which they are entitled under the statute. See *Walters*, 473 U.S. at 320 & n.8; *Atkins* v. *Parker*, 472 U.S. 115, 128 (1985); *Mathews*, 424 U.S. at 332.[7] Addition-

[7] We assume, for purposes of this brief, that respondent had standing to raise the due process rights of his clients with respect to the fee arrangements at issue here. Cf. *Caplin & Drysdale, Chartered* v. *United States*, 109 S. Ct. 2646, 2651 n.3 (1989) (defendant's attorney had *jus tertii* standing to advance his client's constitutional objections to the application of drug forfeiture statute to attorney's fees). We note, however, that in a civil action by an attorney challenging the constitutionality of the black lung fee system, the district court dismissed the action on the basis that the attorney lacked standing to assert the rights of claimants. *Howell* v. *Dole*, No. 88-303 (E.D. Ky. Oct. 13, 1989).

ally, the court appeared to believe that applicants for benefits, who have not yet been found eligible, possess such a "property" interest. Pet. App. 23a & n.31. This Court has never held that applicants for government benefits have a protected property interest under the Fifth Amendment. *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986). Because, however, the court below correctly noted (Pet. App. 23a & n.31) that at least one of respondent's clients was receiving benefits, the Court need not determine in this case if black lung *applicants* have a property interest that brings into play the protection of the Fifth Amendment. See *Walters*, 473 U.S. at 320 n.8.

"Once it is determined that due process applies, the question remains what process is due." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). To guide the inquiry into the adequacy of a particular procedure, the Court has considered three distinct factors: (1) the private interest that will be affected, (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional or alternative procedural safeguards, and (3) the government's interest in adhering to the present system, including the fiscal and administrative burdens the additional requirements would entail. *Mathews*, 424 U.S. at 335; see *FDIC* v. *Mallen*, 108 S. Ct. 1780, 1788 (1988); *Walters*, 473 U.S. at 321; *Schweiker* v. *McClure*, 456 U.S. at 198; *Lassiter*, 452 U.S. at 27. Together, those factors establish that the fee system is constitutional.

1. *The Governmental Interest In The Regulation of Black Lung Attorney's Fees Is Substantial*

The black lung fee system provides for an agency-approved award of a reasonable attorney's fee, shifted to the payor of benefits, which is enforceable when a benefits award is final. Legal fees are not ap-

proved unless a claimant prevails. 30 U.S.C. 932(a) (1982 & Supp. V 1987) (incorporating 33 U.S.C. 928(c)); 20 C.F.R. 725.362-725,367; see p. 4, *supra*. Congress's purpose in regulating the fees payable to attorneys for black lung claimants is to protect claimants from improvident agreements that needlessly deplete their benefits. This Court long ago recognized the validity of such a policy. In *Yeiser* v. *Dysart*, 267 U.S. 540, 541 (1925), the Court upheld the provision in the Nebraska worker's compensation laws requiring approval of the attorney's fees charged a claimant. The Court noted that legislatures may protect claimants "against improvident contracts, in the interest not only of themselves and their families but of the public." *Ibid.* The Court likewise upheld the statutory protection of VA benefits awards against dissipation on attorney's fees in *Walters*, 473 U.S. at 323. While such regulation can be characterized as "paternalism" (*ibid.*), it is beyond doubt that Congress may pursue that policy as a proper legislative purpose. Cf. *Ferguson* v. *Skrupa*, 372 U.S. 726, 728-730 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955). "The paternalistic interest in protecting the [claimant] from his own improvidence would unquestionably justify a rule that simply prevented lawyers from overcharging their clients." *Walters*, 473 U.S. at 365 (Stevens, J., dissenting).[8]

[8] Indeed, in another major entitlement program, Congress has expressed the same policy, albeit in different form from the black lung statute. In regulating the attorney's fees that can be paid by Social Security old age, survivor, and disability claimants, Congress placed a ceiling on attorney's fees of 25% of a claimant's back benefits award. 42 U.S.C. 406(b); see S. Rep. No. 404, 89th Cong., 1st Sess. Pt. 1, at 122 (1965). See *Hopkins* v. *Cohen*, 390 U.S. 530, 534-535 & n.6 (1968).

The regulation of attorney's fees in the black lung program stems from Congress's incorporation of Section 28 of the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C. 928 (1982 & Supp. V 1987)) into the Black Lung Benefits Act. The LHWCA has protected claimants against imprudent fee arrangements since its enactment in 1927. Act of Mar. 4, 1927, ch. 509, § 28, 44 Stat. 1438. Section 28 of the LHWCA, as originally enacted, provided that no one may charge a claimant a fee unless approved by the appropriate court or administrative officer. *Ibid.* This provision was specifically designed to protect a class of unsophisticated workers who had been subjected to the "sharp practices" of people who represented them. See *Hearing on H.R. 9498 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. 40 (1926); *Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary*, 69th Cong., 1st Sess. 68-69 (1926).[9] The provision was modeled on an early New York worker's compensation law, see *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 466 (1968), that was intended to "insure as large a return to the injured workman in compensation for injuries incurred in the course of his employment as possible." *In re Fisch*, 188 A.D. 525, 177 N.Y.S. 338, 341 (1919).

The same reasons that prompted the regulation of attorney's fees in the LHWCA context are equally

[9] The regulation of fees was contained in both of the bills that led to the 1927 LHWCA, and Congress reaffirmed that policy when it added a fee-shifting provision to the LHWCA in 1972. See Pet. 13-14 n.3 (discussing legislative history of LHWCA).

applicable here. The Black Lung Benefits Act has included the LHWCA fee provision since its enactment in 1969. See Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, Tit. IV, § 422, 83 Stat. 796.[10] Its manifest purpose is "to ensure that a claimant's disability benefits not be eroded by legal fees." *Bethenergy Mines Inc.* v. *Director, OWCP*, 854 F.2d 632, 637 (3d Cir. 1988). As with LHWCA claimants, Congress could reasonably conclude that black lung claimants—consisting primarily of elderly coal miners and their eligible survivors—are susceptible to exploitation and require protection against depletion of their benefits. Cf. U.S. Department of Labor, Employment Standards Admin., *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14 (1983) [hereinafter *Sample Survey*] (while some widows have more education, three-fourths of miners did not attend high school). Congress has also been made aware that in the early years of the black lung system certain lawyers were "soaking coal miners with fat fees for very little work." House Comm. on Education and Labor, 96th Cong., 1st Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977*, at 1 (Comm. Print 1979) (statement of Rep. Hechler).

[10] The fee provisions and other portions of the LHWCA were applied to Part C of the black lung statute in conference. See H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. 89-91 (1969). During debate on the conference report, supporters of the legislation uniformly stated their intent to incorporate into Part C the enumerated LHWCA provisions. See 115 Cong. Rec. 39,707, 39,709 (1969) (Rep. Perkins); *id.* at 39,712-39,713 (Rep. Dent); *id.* at 39,718 (Rep. Burton); *id.* at 39,996 (section-by-section analysis of the Conference Report, presented by Sen. Williams); *id.* at 39,999 (Sen. Javits).

Indeed, Congress's concerns have proved to be well-founded, as some attorneys have attempted to collect amounts from claimants contrary to the statute. See, *e.g.*, *In re Shoemaker*, 11 Black Lung Rep. (MB) 3-145 (ALJ 1988) (attorney charged claimant $4480.00, then submitted fee petition for additional $1987.50); *Taylor* v. *Director, OWCP*, 11 Black Lung Rep. (MB) 3-184, 3-185 (ALJ 1988) (attorney collected $2,015.95 at hourly rate of $120 from Director, but required claimant to agree "to a fee of 25% of accumulated benefits, or $3,000 or $120 per hour, whichever was the greatest, plus expenses"). See also *Committee on Professional Ethics and Conduct* v. *Christoffers*, 348 N.W.2d 227 (Iowa 1984).[11]

The court below failed to credit Congress's intention to protect black lung claimants against depletion of benefits by sharing them with an attorney. The court gave that congressional policy short shrift because of its view that "under the current system the claimant seldom has an award to share." See Pet. App. 21a. Yet, the low approval rate of claims has nothing to do with the legitimacy and importance of Congress's policy choice to preserve a benefits award for a claimant, not his attorney.

Changing the fee system would impair other government interests. The court's suggestion (Pet App. 25a) to allow contingent fees based on a percentage

[11] Respondent, for example, generally ignored the possibility of having the Trust Fund or a coal mine operator pay his attorney's fees, instead requiring claimants to share their benefits with him. See generally R. 4, pt. 1 (stipulation before Committee on Legal Ethics). On the two occasions where respondent submitted fee petitions, he also collected unapproved extra fees from the claimants who retained him. See Pet. App. 46a (claimant DeMotto); *id.* at 48a; R. 4, pt. 2 (claimant Hedrick).

of the claimant's award would obviously frustrate Congress's purpose of preserving the pool of benefits for the claimant. See *Lebel* v. *Bath Iron Works Corp.*, 544 F.2d 1112, 1113 (1st Cir. 1976) (per curiam). Moreover, a rule requiring the Trust Fund or a responsible operator to pay attorney's fees calculated as a set percentage of an award would likely not satisfy this Court's standards for analysis of whether a particular fee award is "reasonable." Cf. *Blanchard* v. *Bergeron*, 109 S. Ct. 939 (1989) (a "reasonable" attorney's fee under 42 U.S.C. 1988 is not controlled by the contingency arrangement between counsel and the plaintiff).

The court's alternative suggestion (Pet. App. 25a) —that the Department adopt a statewide contingency "multiplier" to compensate claimants' attorneys for their risk of loss—would impose additional costs on operators and, more particularly, on the Black Lung Disability Trust Fund, which is already some $3 billion in debt to the federal treasury. See *id.* at 39a. Such increased costs, while not determinative, receive some weight in the due process analysis. *Mathews*, 424 U.S. at 348.

More fundamentally, across-the-board contingency multipliers have never received the unqualified approval of this Court. The black lung statute limits fee shifting to contested cases where a claimant prevails and further requires that any fee charged be "reasonable." See 33 U.S.C. 928(a); 20 C.F.R. 725.367. In *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), the Court considered the permissibility of risk enhancement under the Clean Air Act fee-shifting provision, 42 U.S.C. 7604(d). The plurality opinion opposed any enhancement for risk of loss, noting it would "force[] losing defendants to compensate plaintiff's

lawyers for not prevailing against defendants in other cases"; alternatively, the plurality would allow such enhancement only in "exceptional cases." 483 U.S. at 724-725, 728 (White, J., joined by Rehnquist, C.J., and Powell and Scalia, JJ.). Justice O'Connor would have found risk enhancement permissible only when necessary to attract competent counsel for a "class" of cases in a "particular market," and would have required a showing that the plaintiff would encounter " 'substantial difficulties in finding counsel' " absent such enhancement. *Id.* at 733 (concurring in part and concurring in the judgment). The four dissenting Justices, in contrast, urged the award of contingency premiums under a different formula. *Id.* at 735-755 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ.). Thus, while five Justices of this Court have endorsed some form of contingency enhancement—in the context of fee-shifting statutes designed to encourage "private attorneys general"—the standards governing any such enhancement are not at all settled.[12]

Quite apart from the difficulty in crafting a permissible formula for enhancing fees for risk of loss, the determination of an appropriate multiplier can be expected to produce expensive and burdensome

[12] The court below distinguished *Delaware Valley* by noting (Pet. App. 27a) that under the fee-shifting provision before the Court in that case, plaintiffs were not barred from entering into supplementary fee arrangements with their counsel. That assumption, however, is by no means certain. The question whether, under a typical fee-shifting statute (such as 42 U.S.C. 1988), plaintiff's counsel can collect from the plaintiff the difference between a contingency fee and a "reasonable" fee paid by the defendant is presently before the Court in *Venegas* v. *Mitchell*, cert. granted, 110 S. Ct. 45 (1989).

litigation. "'[P]inpointing the degree of risk [is] one of the most subjective and difficult components of the fee computation process,'" 483 U.S. at 732 (O'Connor, J., concurring in part and concurring in the judgment). Consequently, courts have noted that "determining and applying the contingency multiplier would present vast administrative problems." *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 842 F.2d 1436, 1452 (3d Cir. 1988). See also *McKenzie* v. *Kennickell*, 875 F.2d 330 (D.C. Cir. 1989). The government has a substantial interest in avoiding additional complexities in administering the black lung program. The system is already deeply backlogged and is ill-equipped to gather "extensive market information" about attorney's fees in order "to calculate how the market accounts for contingency cases as a class." *Student Public Interest Research Group*, 842 F.2d at 1452. Adopting the contingency multiplier approach as a routine ingredient of fee litigation runs counter to this Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).

2. *Changes In The Regulation of Attorney's Fees Are Not Necessary To Reduce The Probability of Error Under the Present System*

Given the weight of the government's interests, as the dissent below recognized, "'[i]t would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law.'" Pet. App. 34a-35a (quoting *Walters*, 473 U.S at 326). No such "extraordinarily strong showing" was made.

a. The court's pivotal finding—that the fee system has produced a shortage of lawyers for black lung cases—lacks any adequate foundation in the record. Apart from the Department of Labor's submission, discussed below, there were *no* statistics in the record regarding the rate of representation of black lung claimants. Nor was there adequate information suggesting that most claimants were encountering substantial difficulty in attracting competent counsel. Cf. *Delaware Valley Citizens' Council*, 483 U.S. at 731 (plurality opinion) ("Before adjusting for risk assumption, there should be evidence in the record * * * that without risk enhancement the plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market."); *id.* at 733 (O'Connor, J., concurring in part and concurring in the judgment) (same). Rather, the court relied solely on a few attorney affidavits, together with selective citations from congressional testimony, expressing a general unhappiness with the fee system and a belief that there was a consequent shortage of attorneys. Pet. App. 16a-20a. The court entirely overlooked, however, other reports from the same sources downplaying the significance of attorney's fees. For example, in the congressional hearing cited by the court, an attorney who had represented coal miners in black lung cases since 1960 disagreed with the assertions that the attorney's fee system deterred black lung lawyers from taking cases. He observed: "Lawyers never can be paid enough. I honestly think that, to a degree, [criticism of the fee system] is a red herring, and most of the attorneys that have been in this practice, while we have grumbled about the fee arrangement, con-

tinue to be in the practice." *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 45 (1985) [hereinafter *1985 Hearings*]. See also *id.* at 103-104 (United Mine Workers attorney expressing the view that difficulties in obtaining counsel flow primarily from tightened criteria for an award of benefits).

The type of impressionistic evidence in this record is not sufficient to support a finding of unconstitutionality for an administrative program receiving 7,000 or 8,000 new claims a year. Such "anecdotal evidence" cannot sustain findings about the operation of vast federal programs. See *Walters*, 473 U.S. at 324 n.11. The court's analysis is particularly flawed in light of the statistics submitted by the Department of Labor. Although not comprehensive, those statistics showed a 92% rate of representation at the ALJ level in cases resulting in an award or denial of benefits.[13] That showing is hardly consistent with the view that the fee system has virtually eliminated the pool of lawyers willing to take black lung cases.[14]

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[13] See R. 27 (Affidavit of Jane G. Denney). The information submitted to the court was compiled in connection with the Department of Labor's petition for rehearing and reflects the evaluation of ALJ determinations in cases filed during fiscal year 1987. The Department advises us that it does not generally prepare statistics on the rate of representation in black lung cases. Recently, the General Accounting Office, in connection with a forthcoming report, has requested more detailed information about the rate of representation before the Board in black lung cases.

[14] It is also significant that at congressional hearings, attorneys have presented to lawmakers the same type of arguments that were presented to the court here about the alleged impact of the fee system on the availability of competent counsel. See *1985 Hearings*, *supra*. Despite that information, and continued congressional attention to the problem, see *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. (1988), Congress has never made legislative "findings" that the attorney's fee system bears responsibility for any difficulties in arranging for representation in the black lung program. Nor has Congress revised the attorney's fee system, as it was urged to do, to take account of the deficiencies perceived by some black lung attorneys. In light of Congress's superior fact-finding ability regarding the operation of massive benefits programs, *Walters*, 473 U.S. at 330-331 n.12, the court below should have given consideration to Congress's "refusal to impose on the Secretary" a different set of fee regulations than currently prevails. Cf. *Heckler* v. *Day*, 467 U.S. 104, 112 (1984) (district court erred in issuing statewide injunction against the government to comply with mandatory deadlines for disability determinations in light of Congress's awareness of the problem and consistent refusal to impose similar deadlines).

b. Even assuming that attorneys are presently unavailable for substantial numbers of claimants, the court overrated the probable value of changes to the attorney's fee system as a corrective measure. First of all, in light of the flexible criteria governing the award of fees, it is doubtful that the current fee system is the cause of any shortage of attorneys. Black lung fees are generally computed on the attorney's usual and customary rate when the work was performed. Applying that approach, "the scale upon which lawyers are generally compensated" in black lung cases has recently been from $60 to $120 per hour. *Alexander* v. *Director, OWCP*, 12 Black Lung Rep. (MB) 3-566 (ALJ 1988) (awarding $70

an hour for new attorney and $135 an hour for senior associate in large law firm). The information presented to the court below was consistent with that range. See Br. in Opp. App. A24 (affidavit of Frederick Muth that attorneys may expect $85 an hour at the deputy commissioner level and up to $125 an hour from ALJs and the Board). In some cases, ALJs have boosted fees by using the rates prevailing at the time of the award. *Cloos* v. *Director, OWCP*, 8 Black Lung Rep. (MB) 3-55 (ALJ 1985) (1983 rates of $100 an hour awarded for attorney retained in 1976 for work in 1981 and 1983). Cf. *Missouri* v. *Jenkins*, 109 S. Ct. 2463, 2468-2469 (1989). That level of compensation is hardly so inadequate as to destroy all attorney interest in black lung cases. Cf. *Superior Court Trial Lawyers Ass'n* v. *FTC*, 856 F.2d 226, 228 (D.C. Cir. 1988) (from 1970 to 1983, Criminal Justice Act attorneys in the District of Columbia were paid $30 an hour for court time and $20 per hour for office time), cert. granted, 109 S. Ct. 1741 (1989).

Of course, an award of attorney's fees is not enforceable until a black lung benefits award is final. A reasonable hourly rate, however, will account for the possibility of such delay.[15] See *Missouri* v. *Jen-*

[15] An enhancement to an attorney's customary hourly rate to compensate for delay, insofar as it is seen as an award of interest, may not be available against the United States absent congressional consent. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). In cases arising before *Shaw*, courts found it unnecessary to decide whether an award of attorney's fees against the Trust Fund is an award against the United States because they construed the statutory incorporation of the LHWCA fee-shifting provision, in conjunction with 30 U.S.C. 934(a), to authorize payment of attorney's fees from the Trust Fund. See, *e.g.*, *Director, OWCP* v. *Black Diamond*

kins, 109 S. Ct. at 2468-2469. In the black lung program, the Department assumes that the attorney's customary hourly rate incorporates a component for delay. See *Hobbs* v. *Director, OWCP*, 820 F.2d 1528, 1529 (9th Cir. 1987) (the Board reasonably assumes that "any potential devaluation of a fee award as the result of delay [in LHWCA cases] is comprehended in the basic fee structure of the attorneys providing services"); *Thompson* v. *Potashnick Constr. Co.*, 812 F.2d 574, 577 (9th Cir. 1987) (describing Board policy that hourly rates adjust for anticipated delays). Given the prevalence of delayed payment in the black lung field, as in the LHWCA context, *Hobbs*, 820 F.2d at 1529, an assumption that hourly rates are set with that prospect in mind is entirely reasonable.[16]

Courts have also recognized that an attorney's hourly rate may incorporate an adjustment for risk of loss. See, *e.g.*, *Cotter* v. *Bowen*, 879 F.2d 359, 363 (8th Cir. 1989). Cf. *Delaware Valley*, 483 U.S. at 726 (plurality opinion) ("it may well be that using a contingency enhancement is superfluous and unnecessary under the lodestar approach to setting a fee").

Coal Mining Co., 598 F.2d 945, 948-949 (5th Cir. 1979); *Republic Steel Corp.* v. *United States Department of Labor*, 590 F.2d 77, 82 & n.6 (3d Cir. 1978). Whatever the status of the Trust Fund, which is a federally administered Treasury account derived mainly from an excise tax on coal (see note 2, *supra*), it "may not be comparable" to other federal agencies or corporations. *Black Diamond*, 598 F.2d at 948 n.3.

[16] To the extent that claimants' attorneys desire a different or more explicit treatment of delay, they can of course litigate the issue under the black lung fee system. See also *Workman* v. *Director, OWCP*, 6 Black Lung Rep. (MB) 1-1281, 1-1283 (Ben. Rev. Bd. 1984) (attorney's time litigating a fee award can be compensated).

The Board has applied this principle under the black lung statute, stating that an hourly rate is "manifestly inadequate" if it does not compensate for risk of loss. See, *e.g.*, *Taylor* v. *Director, OWCP*, 6 Black Lung Rep. (MB) 1-427 (Ben. Rev. Bd. 1983) ($50 an hour at initial stages of the case is manifestly inadequate for attorney who practices in West Virginia); *McKee* v. *Director, OWCP*, 6 Black Lung Rep. (MB) 1-233, 1-237 (Ben. Rev. Bd. 1983) (vacating fee award). Cf. *Esselstein* v. *Director, OWCP*, 676 F.2d 228 (6th Cir. 1982) (per curiam) (no abuse of discretion to award hourly rate of $65, based on $50 market rate in attorney's county plus $15 for risk of loss, even though national hourly rate might be higher).[17]

An additional reason for doubting that the fee system has driven lawyers from the black lung field is that there is an entirely separate disincentive to representation: the dramatically reduced claims-approval rate under revisions to the black lung statute. Under the 1981 amendments, as the court noted (Pet. App. 14a), the approval rate for claims at the initial adjudicatory level has dropped to approximately 5 percent.[18] This factor was prominently mentioned in

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[17] Respondent seems to have understood that proposition because he cited risk of loss as one of the factors in determining an hourly rate of $125 that he requested from an ALJ. See R. 4, pt. 2 (claimant Hedrick). The ALJ noted that respondent's total requested fee, divided by the number of hours requested, in fact produced a rate closer to $75, which the ALJ awarded. *Ibid.*

[18] Congress's adjustment of the eligibility standards, of course, presents no due process problem. See *Bowen* v. *Gilliard*, 483 U.S. 587, 598 (1987); *Atkins* v. *Parker*, 472 U.S. 115, 129-130 (1985).

the attorney affidavits on which the court relied in concluding that the fee system discouraged attorney representation. See Br. in Opp. App. A3-A4, A11-A12, A24, A27, A30. With such limited chances of success, the interest of some attorneys has undoubtedly waned. That result, however, cannot rationally be attributed to the characteristics of the fee system.

Experience under earlier versions of the black lung statute confirms that the current low approval rate—and not the delay in the payment of fees—is the primary reason for any reduction in the number of claimants' attorneys. Delays also existed for claims adjudicated under earlier versions of the law that were far more favorable to claimants. Nevertheless, attorneys were widely available to handle such claims. See *1985 Hearings*, *supra*, at 103.

c. In analyzing the risk of error in light of the fee system, it is relevant to consider the existence of procedures that protect claimants from an erroneous denial when a lawyer is not present. Cf. *Walters*, 473 U.S. at 330. While the black lung program is not intended to function as informally as the VA benefits system at issue in *Walters*, the Department of Labor nonetheless uses a variety of mechanisms to reduce the risk of error for pro se claimants.

Under regulations governing the black lung program, the initial stage of a claim is submission to an appropriate office of the Department of Labor, either directly or through the Social Security Administration. 20 C.F.R. 725.303(a)(1). That office must give assistance to claimants in filling out the requisite forms. 20 C.F.R. 725.304(a). Following the filing of a claim,

> [e]ach miner * * * shall be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation. Accordingly, the Office [of Workers' Compensation Programs] shall assist each claimant in obtaining the evidence, including medical evidence, necessary for a complete adjudication of a claim. In the case of a miner's claim, initial medical tests and examinations shall be arranged for the miner by the Office, at no cost to the miner.

20 C F.R. 718.401. The deputy commissioner, who initially determines the claim, is required to give a claimant an opportunity for a pulmonary examination, 30 U.S.C. 923(b); 20 C.F.R. 725.405(b)), at the Trust Fund's expense (20 C.F.R. 725.406(c)); to gather evidence of the miner's employment (20 C.F.R. 725.405(d)); and otherwise to "take such action as is necessary to develop, process, and make determinations with respect to the claim" (20 C.F.R. 725.401). In survivor's cases, the deputy commissioner must also gather "whatever medical evidence is necessary and available" (20 C.F.R. 725.405(c)). The deputy commissioner has authority to schedule an "informal conference in any claim where it appears that such conference will assist in the voluntary resolution of any issue raised with respect to the claim." 20 C.F.R. 725.416(a). At such a conference, the deputy commissioner must inform the claimant about the consequences of any proposed agreement and, if the claimant does not understand it, the deputy commissioner "shall not permit the execution of any stipulation * * * unless it is clear that the best interests of the claimant are served thereby." 20 C.F.R. 725.416(d). If the evidence does not support an initial award of benefits, the

deputy commissioner sends the claimant a letter specifying the reasons for the denial and outlining the precise procedures and time limits for further review. 20 C.F.R. 725.410(c). This form of notice has been held adequate to protect the due process rights of pro se claimants. *Jordan* v. *Benefits Review Board*, 876 F.2d 1455 (11th Cir. 1989). See also *Adams* v. *Harris*, 643 F.2d 995 (4th Cir. 1981).

An appeal from the deputy commissioner's determination may be taken to an ALJ. It is true that the proceedings before an ALJ take place in a more adversarial, trial-type setting. See 20 C.F.R. 725.450-725.457. Nevertheless, there are safeguards to protect against the risk of error for pro se claimants. In any case involving a hearing, an ALJ must determine whether a pro se claimant is able to proceed without an attorney. 20 C.F.R. 725.362(b). In the absence of such a determination, an ALJ's denial of benefits will generally be vacated. See *Shapell* v. *Director, OWCP*, 7 Black Lung Rep. (MB) 1-304 (Ben. Rev. Bd. 1984). Moreover, ALJs as a matter of practice assist pro se claimants in finding attorneys by providing hearing notices that include names and addresses of attorneys who represent black lung claimants and by recommending bar association referral services, unions, legal aid societies, and law schools that may provide clinical programs. See R. 27 (Affidavit of Nahum Litt, Chief ALJ for the Department of Labor).[19] If a claimant wants legal

[19] The Department of Labor originally submitted this affidavit in *Nuckles* v. *Brock*, No. 87-0125-B (W.D. Va.), a due process challenge to the black lung fee system that the district court dismissed on March 4, 1988, essentially for plaintiff's failure to prosecute. The Department resubmitted the affidavit to support its petition for rehearing below.

representation but is unable to retain an attorney in time for a hearing, it may constitute an abuse of discretion, under those circumstances, for an ALJ not to grant a continuance. See *Johnson* v. *Director, OWCP*, 9 Black Lung Rep. (MB) 1-218 (Ben. Rev. Bd. 1986).

Finally, the Benefits Review Board has adopted procedures to provide for a fair review of a pro se claimant's case on appeal. The Board does not require pro se claimants to submit briefs; moreover, it conducts an independent review of ALJ decisions for error. *McFall* v. *Jewell Ridge Coal Corp.*, 12 Black Lung Rep. (MB) 1-176 (Ben. Rev. Bd. 1989) (applying 20 C.F.R. 802.211(e), 802.220); *Antonio* v. *Bethlehem Mines Corp.*, 6 Black Lung Rep. (MB) 1-702 (Ben. Rev. Bd. 1983).

In sum, the Department of Labor has focused on the problem of assuring fairness to pro se claimants and developed regulations designed to protect their procedural rights. These procedures cushion the process for pro se black lung claimants seeking to apply for or retain benefits.

d. This Court has recognized that a lawyer—whether retained or appointed—is not essential in all cases in order to have a fair proceeding; rather, the due process interest in being represented by counsel varies substantially depending upon the particular setting and the competing interests at stake.[20]

[20] In criminal cases, of course, the Sixth Amendment (applied to the States through the Fourteenth Amendment) requires the availability of counsel to all defendants at the trial level, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and through one level of appeal as of right, *Douglas* v. *California*, 372 U.S. 353 (1963). Cf. *Ross* v. *Moffitt*, 417 U.S. 600 (1974) (right to counsel does not apply to discretionary review of intermediate appellate court by state supreme court); *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987) (State has no constitutional obligation to provide counsel for indigent prisoners seeking postconviction collateral relief); *Murray* v. *Giarratano*, 109 S. Ct. 2765 (1989) (same conclusion as to death row inmates).

The Court has applied a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Lassiter* v. *Department of Social Services*, 452 U.S. at 26-27; see *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency proceedings). When a person faces a less severe loss of liberty, however, there is no absolute right to counsel; rather, any right to appointed counsel must be established from considerations arising from the facts of a particular proceeding, evaluated on a case-by-case basis. See *Lassiter*, 452 U.S. at 31-32 (parental termination proceeding); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation revocation hearing); *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972) (parole revocation hearing). Cf. *Vitek* v. *Jones*, 445 U.S. 480, 496, 497 (1980) (plurality opinion); *id.* at 499-500 (Powell, J., concurring in part) (hearing regarding involuntary transfer of an inmate to mental institution for treatment). In cases affecting even weaker liberty interests, the government's interest in less formal procedures, considered with the other *Mathews* factors, has led to the conclusion that counsel need not be provided in *any* case. See *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974) (inmate facing prison disciplinary proceedings has no "right to either retained or appointed counsel"); *Goss* v. *Lopez*, 419

U.S. 565, 583 (1975) (students facing short suspensions have no right to "secure counsel").[21]

In cases involving an entitlement to government benefits that qualifies as "property," the Court has never held that due process requires the presence of counsel in order to guarantee fundamental fairness. In *Randolph* v. *United States*, 274 F. Supp. 200 (M.D.N.C. 1967) (per curiam), summarily aff'd, 389 U.S. 570 (1968), the Court affirmed the judgment of a three-judge district court rejecting a due process claim quite similar to that accepted by the court below. The plaintiff in *Randolph* contended that 42 U.S.C. 406(a), which governs the payment of attorney's fees by Social Security claimants, "so effectively discourage[s] attorneys from handling social security cases that the claimants are deprived of the assistance of counsel." 274 F. Supp. at 203. The court reasoned that even if the fee system had the effect ascribed to it, the claim must fail because the court could not "accept the plaintiff's initial premise * * * that claimants for social security benefits have a constitutionally protected right to counsel in pursuing their claims through the administrative procedures of the social security system." *Ibid.*

Indeed, in *Walters*, the Court went further and specifically rejected the claim that the Fifth Amend-

[21] See also *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976) (applying *Wolff* v. *McDonnell, supra*, to a prison disciplinary hearing involving charges of conduct that also violate state criminal law); *Middendorf* v. *Henry*, 425 U.S. 25, 42-48 (1976) (serviceman facing summary court martial has no right to have counsel provided); *Parham* v. *J.R.*, 442 U.S. 584 (1979) (minor facing involuntary civil commitment by a parent has no right to an adversary hearing or, implicitly, counsel).

ment entitles a claimant to pay for counsel with his own funds in a VA benefits proceeding. The Court in *Walters* took note that *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), had interpreted the Due Process Clause to require an evidentiary hearing before the suspension of welfare benefits and had said that while counsel need not be provided, "the recipient [in that hearing] must be allowed to retain an attorney if he so desires." *Id.* at 270. As the Court observed in *Walters*, however, the State in *Goldberg* did not have a policy "against permitting an applicant to divide up his welfare check with an attorney who had represented him in the proceeding." *Walters*, 473 U.S. at 333. Moreover, the *Walters* Court also distinguished *Goldberg* by noting that disability benefits have far lesser "weight" in the due process analysis than welfare benefits, "upon which the recipients in *Goldberg* depended for their daily subsistence." *Ibid.* The Court found that factor "determinative of the right to employ counsel." *Ibid.*[22] Against that background, the court below clearly erred in concluding that black lung proceedings are, across-the-board, constitutionally inadequate without the presence of counsel.[23]

[22] The Court in *Walters* also stated, as an additional means of distinguishing prior cases, that the VA process is designed to work nonadversarily and that "counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding." 473 U.S. at 333. *Walters*, however, had no occasion to consider the application of the Due Process Clause to those types of proceedings, nor to define with precision what factors might tip the due process balance in favor of an unregulated right to retain counsel.

[23] We recognize that the due process analysis of the right to appointed counsel is not identical to that of the right to retain counsel with one's own funds. But Congress clearly

The nature of black lung proceedings supports that conclusion. The determination of black lung benefits turns largely on medical matters. To be eligible for benefits, a miner must establish that he is (a) totally disabled; (b) by pneumoconiosis; (c) arising from coal mine employment. See 30 U.S.C. 922(a), 932(c); *Sebben*, 109 S. Ct. at 420. Given that medical focus, "it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment." *Walters*, 473 U.S. at 330. See also *Mathews*, 424 U.S. at 344; *Richardson* v. *Perales*, 402 U.S. 389, 404 (1971). Apart from medical matters, the primary issue is to verify the facts regarding a miner's employment. Again, counsel is not essential for that purpose.[24]

Certainly, some black lung cases may be legally or factually more complex, or contentious, than others. Justice Powell emphasized for the Court in *Mathews*, however, that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." 424 U.S. at 344. See *Walters*, 473 U.S. at 330 ("a process must be judged

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may restrict an entitlement claimant's funds in order to ensure that the benefits are applied to a claimant's personal needs rather than defraying legal expenses, see pp. 21-25, *supra*.

[24] For example, in *Esselstein* v. *Director, OWCP*, 676 F.2d 228 (6th Cir. 1982) (per curiam), the court of appeals noted that a claimant's counsel had a "straightforward" task to perform because medical evidence had already been submitted by the claimant himself and because "the only thing necessary to qualify the claimant for benefits was submission of proof of coal mine employment." *Id.* at 229. There is no reason to believe that counsel is indispensable in such a situation.

by the generality of cases to which it applies, and therefore a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them"); *Califano* v. *Yamasaki*, 442 U.S. 682, 696 (1979). While case-by-case determinations of the requirements of due process may be appropriate when significant liberty interests are at stake, see, *e.g.*, *Lassiter*, 452 U.S. at 31-32, such an individualized approach is not required here, given the nature of the property interest and the government's countervailing interest in generally-applicable rules to govern a massive benefits program. In any event, the court below clearly erred in concluding that the regulations violate due process in every black lung proceeding, and there is nothing in the record from which to determine whether the regulations have a more serious or detrimental impact on a particular type or group of black lung cases.

In its initial opinion, the court relied exclusively on the experiences of the handful of claimants represented by respondent to support a generalization about the necessity of employing counsel. The court found it significant that respondent was able to obtain benefits for his clients that were previously denied when the clients were without counsel. Pet. App. 22a. The court did not consider, however, that the awards in question may have simply resulted from amendments to the statute under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, which required reconsideration of the previous denials under standards more favorable to claimants.[25] See *Sebben*, 109 S. Ct. at 418 (dis-

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[25] See R. 4, pt. 1 (awards to claimants in State Bar materials); R. 27 (Department of Labor materials) (showing

cussing 1977 Act). Even granting that the improved results in those few cases were attributable to respondent, there is no basis for speculating that the experience of those claimants was representative of black lung claimants generally.

Nor do the Department of Labor's statistics show that lawyers necessarily produce a better outcome for claimants. Cf. Pet. App. 40a (characterizing the statistics as "conclusively demonstrat[ing] that at the [ALJ] level, claimants represented by counsel have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se*"). In the Department's submission, 92% of the claimants were represented in cases resulting in an award or denial of benefits; only a small percentage proceeded pro se. That fact significantly undercuts the use of comparative success rates as a ground for concluding that pro se claimants win less frequently because they lack lawyers. A more likely explanation of the results is that the pro se claimants did not attract lawyers because their cases were weaker. Compare *Lassiter*, 452 U.S. at 29 n.5 (finding similar statistics "unilluminating").

3. *A Claimant's Interest In Black Lung Disability Benefits Is Not Equivalent To That Of A Recipient Of Subsistence Welfare Benefits*

The third *Mathews* factor is the private interest affected. In both *Walters* and *Mathews*, this Court stressed that the disability benefits at issue were not based on need, nor did they constitute a recipient's sole means of livelihood. See *Walters*, 473 U.S. at 333; *Mathews*, 424 U.S. at 342-343. Consequently, the Court declined to equate the significance of those

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that all awards to respondent's clients were made under the 1977 amendments).

benefits to the subsistence welfare benefits considered in *Goldberg* v. *Kelly*. The Court explained in *Mathews* that the unusually heavy weight given the private interest in *Goldberg* came from the unique nature of welfare as "assistance * * * given to persons on the very margin of subsistence." 424 U.S. at 340. " 'The crucial factor in this context—a factor not present in the case of . . . virtually anyone else whose government entitlements are ended—is that the termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.' " *Ibid.* (quoting *Goldberg*, 397 U.S. at 264).

Here, as in *Mathews* (424 U.S. at 342), the disability benefits sought are but one form of government aid that claimants may seek. Over 90% of black lung beneficiaries' households receive social security benefits and 31% also receive union pensions. *Sample Survey*, *supra*, at 18. What is more, black lung benefits are awarded to former miners who are unable to do coal mining jobs or comparable work. See 30 U.S.C. 902(f)(1)(A). That is a less stringent test of disability than in *Mathews*, where the benefits were available only for inability to do any substantial gainful work in the national economy (424 U.S. at 336). See also 30 U.S.C. 901 (survivors of miners, who do not have to prove any personal disability, are also eligible for benefits).

Respondent argues (Br. in Opp. 7) that black lung claimants more closely resemble the welfare recipients in *Goldberg* because of their modest resources. But the claimants in *Mathews* also had modest resources. Compare 424 U.S. at 342 n.26, with *Sample Survey*, *supra*, at 17. Respondent's observation (Br. in Opp. 7-8) that the black lung benefits (like

social security disability benefits in *Mathews*, see 42 U.S.C. 424a) may be reduced by other sources of income is an argument against their importance to a claimant, not in favor of it.

4. *The Balance Of The* Mathews *Factors Requires The Conclusion That The Fee System Is Constitutional*

Considering the three *Mathews* factors, the balance decidedly tips in favor of the black lung fee system's constitutionality. The government interest in preserving a benefit award for a claimant through fee regulation is important, while changing the attorney's fee system, as contemplated by the court below, would be administratively difficult as well as costly. The current procedures contain adequate safeguards to protect against the erroneous denial of benefits for pro se claimants, and, at all events, an attorney is not an essential element of due process in all black lung cases. Finally, the claimant's interest in the receipt of non-subsistence disability benefits is not so strong as to require the invalidation of the fee system as a means to encourage new attorneys to take these cases. Balancing those factors, the black lung fee system does not violate the due process rights of claimants.

C. The Fee System Does Not Violate Procedural Due Process In Any Other Respect

The court also stated that "[a]lternatively, there is an independent basis for finding a violation of due process." Pet. App. 24a. Citing only *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 49 (1803), the court concluded that the "fee limitation scheme * * * effectively denies claimants the right to benefits granted by Congress," which it believed to be "fundamentally

unfair." Pet. App. 24a. That conclusory analysis is flawed. To the extent that benefits conferred by Congress are protected by the Fifth Amendment, the measure of the process that is due is defined by consideration of the *Mathews* factors. If the procedures are adequate under that test, then the due process inquiry is at an end.

Respondent also attempts to inject into the due process calculus a liberty interest "of an individual to consult with attorneys on matters affecting his legal rights." Br. in Opp. 6. That interest furnishes no additional support for the contention that the fee system is invalid.[26] A "liberty" interest in hiring counsel to seek government benefits is inextricably intertwined with the claimant's interest in effectively presenting a claim for those benefits. Such a liberty interest thus has no more "independent significance" than the asserted First Amendment interest in *Walters*, 473 U.S. at 335. There, the Court rejected the theory that a VA claimant had a First Amendment right to use his resources to obtain "meaningful access to the courts," reasoning that the asserted right was "inseparable" from the due process argument that the VA fee system denies claimants a meaningful opportunity to present a claim. *Ibid.* Here, too, any liberty interest in hiring counsel to prosecute a black lung benefits claim stands or falls with the underlying due process "property" claim. Consequently, the asserted liberty interest does not enhance respondent's due process argument.

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[26] The Court has long since rejected any view that an attorney's "liberty" interest in contracting with a client is immune from government regulation. See *Hines* v. *Lowrey*, 305 U.S. 85 (1938); *Margolin* v. *United States*, 269 U.S. 93, 102 (1925); *Calhoun* v. *Massie*, 253 U.S. 170, 174-175 (1920).

CONCLUSION

The judgment of the West Virginia Supreme Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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Nos. 88-1671 and 88-1688

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

GEORGE R. TRIPLETT, *et al.*

COMMITTEE ON LEGAL ETHICS OF THE
WEST VIRGINIA STATE BAR,
Petitioner

v.

GEORGE R. TRIPLETT, *et al.*

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the attorney's fees provisions of the Black Lung Benefits Act, as applied, violate the Due Process Clause of the Fifth Amendment by denying claimants access to counsel.

PARTIES TO THE PROCEEDING

The petitioner in No. 88-1671 is the United States Department of Labor, intervenor below. The petitioner in No. 88-1688 is the Committee on Legal Ethics of The West Virginia State Bar, the petitioner below. George R. Triplett, the respondent below, is the respondent in this Court.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Appeals is reported at 378 S.E.2d 82. The Findings of Fact, Conclusions of Law, and Recommendation Concerning Discipline of the Committee on Legal Ethics of The West Virginia

State Bar (Pet. App., No. 1671, 42a-51a), are unreported.[1]

JURISDICTION

The judgment of the Supreme Court of Appeals was entered October 26, 1988 (Pet. App., No. 1671, 1a-30a). A petition for rehearing was denied on December 21, 1988 (Pet. App., No. 1671, 52a). On March 14, 1989, Chief Justice Rehnquist extended the time for filing a petition for a Writ of Certiorari to and including April 20, 1989. On April 18, 1989, the Petition for Writ of Certiorari was filed. By Order dated October 2, 1989, this Court granted the Petition pursuant to 28 U.S.C. Section 1254(1). This case, by the same order, was consolidated with *United States Department of Labor v. George R. Triplett, et al.*, No. 88-1671.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a) (1982 & Supp. V 1987), incorporating various provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), and Section 28 of the LHWCA (33 U.S.C. 928 (1982 & Supp. V 1987)), which is one of the provisions so incorporated, are set forth in the Pet. App., No. 1671, 53a-56a.

The Department of Labor's regulations governing the payment of claimants' attorney's fees in black lung cases, 20 C.F.R. 725.365-725.367, are set forth in the Pet. App., No. 1671, 52a-60a.

STATEMENT

In this case the Supreme Court of Appeals of West Virginia determined that the system for awarding attorney's fees in black lung cases violated the Due Process Clause of the Fifth Amendment by denying claimants

[1] The Petitioner relies upon the Petitioner's Appendix, No. 1671 already filed in this matter.

access to counsel. The court concluded that the attorney's fee system produces undue delays in payment and provides inadequate compensation, thereby discouraging most attorneys in West Virginia from representing claimants for black lung benefits. The court thus held that, as applied, the attorney's fee provisions are unconstitutional, and, consequently, the violation of those provisions cannot serve as the basis for attorney discipline proceedings.

Petitioner originally charged Respondent Triplett with misrepresentation to the Department of Labor regarding his intentions to collect a fee. For this reason, charges were laid under West Virginia Disciplinary Rule 1-102 (a)(4)(5) and (6), alleging professional misconduct reflecting upon Respondent Triplett's fitness to practice law. The West Virginia Supreme Court of Appeals found that Respondent Triplett's misconduct was "his knowing violation of the DOL regulations, not his alleged misrepresentation to the DOL regarding his intention to collect a fee." The West Virginia Supreme Court pointedly added that had Petitioner found Respondent ". . . lied to the DOL, such a finding would not have been supported by the record." (Pet. App., No. 1671, 6a).

Petitioner further adopts the Statement of the Case prepared and filed by the United States Department of Labor.

SUMMARY OF ARGUMENT

The federal black lung fee system, as applied, does not violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States. Invalidation would frustrate the federal purpose of protecting claimants against improvident contracts, and would expose the Black Lung Disability Trust Fund to greater liability. Additionally, there has not been an extraordinarily strong showing of probability of error in the current Department of Labor fee system to warrant the finding below that the system violates the Due Process Clause of the Fifth Amendment of the Constitution.

ARGUMENT

I. INVALIDATION WOULD FRUSTRATE THE FEDERAL PURPOSE OF PROTECTING CLAIMANTS IMPROVIDENT CONTRACTS AND WOULD EXPOSE THE BLACK LUNG DISABILITY TRUST FUND TO GREATER LIABILITY.

As shown in this case on its merits, claimants were forced to pay Black Lung fees without the benefit of having them properly approved. A review of the rules and the history of the Department of Labor in administering the program shows a clear purpose to protect claimants against improvident contracts.

Evidence in the record below makes clear the necessity for protection. For example, in one incident, where Respondent ultimately did file a petition, the fee petition claimed 42 hours, and Respondent Triplett could only substantiate 22 hours. The Department only approved payment for 27 hours. Likewise, Administrative Judge Warsaw deleted 6 hours from Respondent's fee petition because 4 hours were not sufficiently itemized and 2 were spent preparing the fee petitions. He also reduced Respondent's hourly rate. [Respondent's Hearing Exhibit 14].

Respondent Triplett complained that the fee petition process was time-consuming and frustrating. His claim was apparently successful in changing the focus of the court below from scrutinizing Respondent Triplett's actions to scrutinizing the Black Lung process. The State Bar showed that Respondent's conduct was prejudicial to the administration of justice. Congress and the Department of Labor have determined that claimants, who may receive a large lump sum of money, need protection from their attorneys or lay representatives with respect to fees. But the protection depends in large part upon the honesty and trustworthiness of the attorneys. Claimants rarely complain because they receive at least some money. They

most often do not understand the fee provisions anyway, as was demonstrated by every client witness who testified at the hearing. When attorneys ignore important regulations and misrepresent facts to those who administer the program, the system of justice is prejudiced and protections are needed.

It is further submitted that Respondent, as an officer of the Court, had other, more ethical ways to challenge the Black Lung Fee system, which would have allowed for the protection of the public.[2] Respondent Triplett's complaints are no excuse for breaking the law. "While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold the legal process." [3]

II. THERE HAS BEEN NO EXTRAORDINARILY STRONG SHOWING OF PROBABILITY OF ERROR IN FEDERAL BLACK LUNG PROCEDURE.

This Court in *Walters v. National Association of Radiation Survivors, et al.*, 473 U.S. 305 (1985), which case provided the basis for the opinion below, stated "[i]t would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law." Such a rule should apply in this case as well.

The issue of the constitutionality of the Black Lung regulations was neither briefed, argued or raised by the parties below. Based upon what might be labeled as "anecedotal evidence", the Court below reached its decision on the basis of an amicus brief with several affida-

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[2] This is especially true since the moneys concerned had been put into escrow.

[3] Preamble, West Virginia Rules of Professional Conduct, Court Rules Volume, The West Virginia Code.

vits. Justice Miller, writing in dissent for himself and Justice McHugh, stated, "The ex parte affidavits filed as attachments to the amicus brief . . . are, to my mind, *woefully inadequate* to predicate the factual conclusion reached by the majority." (underlying applied) He goes on to note that there was not such an "extraordinarily strong showing" as to warrant the majority decision.[4] He concludes by stating:

> "Finally, there appears to me to be a lamentable lack of due process extended to the Department of Labor, which now finds its attorney's fee mechanism declared unconstitutional without ever having the opportunity to be heard before this Court announced its decision."

The Committee on Legal Ethics has an interest in enforcing valid disciplinary regulations that prohibit the violation of Department of Labor fee regulations. Additionally, while never briefed, argued or discussed below, the Committee has an interest in determining whether a lawyer can ethically enter into a contingent fee contract in an area governed by a valid fee shifting statute or regulation.[5]

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[4] He also notes the affidavits go to problems caused by the delay in receiving approved fees, not the amount of the fees.

[5] This problem was broadly discussed in Footnote 8 of *Committee on Legal Ethics v. Tatterson*, 352 S.E.2d 107 (W.Va. 1986). Various jurisdictions have taken conflicting positions on this matter. Contrast *Wheatley v. Ford*, 679 F.2d 1037 (CA 2, 1982) wherein the court held a contingent fee award must be deemed satisfied to the extent counsel receives the statutory award with *Sullivan v. Crown Paper Board Company*, 719 F.2d 667 (CA 3, 1983) holding counsel should receive contingent or statutory amount, whichever is greater. A variation of this is currently before the Court in *Venegas v. Mitchell*, No. 88-1725, Cert. granted (Oct. 2, 1989).

In short, the record below is grossly inadequate to make the showing *Walters*[6] requires to support its holding in this case.

III. PETITIONER FURTHER ADOPTS THE ARGUMENTS PREPARED AND FILED BY THE UNITED STATES DEPARTMENT OF LABOR.

CONCLUSION

The decision of the West Virginia Supreme Court of Appeals should be reversed, and this case remanded for further proceedings.

Respectfully submitted,

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[6] *Walters v. National Association of Radiation Survivors, et al.*, 473 U.S. 305 (1985).

(9) (8)

Nos. 88-1671 and 88-1688

FILED
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In The

Supreme Court of the United States

October Term, 1989

UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

GEORGE R. TRIPLETT, ET AL.,

Respondents.

COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR,

Petitioner,

v.

GEORGE R. TRIPLETT, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

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STATEMENT

The opinion of the Supreme Court of Appeals of West Virginia, which appears as an appendix to the Petition for Writ of Certiorari filed by the Department of Labor, is incorporated by reference.

This opinion was originally published as *Committee on Legal Ethics v. Triplett*, 376 S.E.2d 818 (W.Va. 1988), and was subsequently republished, as corrected, at 378 S.E.2d 82.

SUMMARY OF ARGUMENT

The Supreme Court of Appeals of West Virginia correctly applied the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), in concluding that the rules and regulations of the black lung benefit program, as applied, impermissibly restrict the due process rights of black lung claimants to retain legal counsel to assist them in black lung proceedings. Whatever interest, if any, the government may have in perpetuating the inadequate levels of compensation for attorneys and delays in fee payment which have discouraged many attorneys from handling black lung claims is markedly outweighed by the claimants' interest in obtaining the black lung benefits to which they are entitled, and the probability of an erroneous denial of such benefits when claimants are forced to proceed *pro se*.

Black lung claimants have a significant property interest in obtaining and retaining black lung benefits, which frequently spell the difference between a decent or substandard quality of life for miners and their families.

In terms of need, black lung claimants more closely resemble the welfare recipients in *Goldberg v. Kelly*, 397 U.S. 254 (1970), then the disabled veterans in *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305 (1985)

As the Department of Labor notes at page 20 of its brief, "[t]he touchstone of procedural due process is 'fundamental fairness.' " *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981), in providing "an opportunity '[to be heard] at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)."

This Court has long recognized that access to counsel is an important element of due process in both criminal and civil proceedings. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 68-9 (1932); *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970). Although there may be some administrative proceedings which are so simple, informal and nonadversarial in nature that due process does not require that a claimant be allowed to retain legal counsel if he so desires, see *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305 (1985) (VA disability benefits), *Randolph v. United States*, 274 F.Supp. 200 (M.D. N.C. 1967) (per curiam), *aff'd per curiam*, 389 U.S. 570 (1968) (social security benefits), black lung proceedings, as a general rule, are not among them. It is fundamentally unfair to compel a claimant with little schooling and limited financial resources to thread his way through a Byzantine labyrinth of rules, regulations and statutes, and to confront, *pro se*, powerful adversaries employing skilled counsel, in order to obtain the benefits he needs in order to ensure a decent standard of living for himself and his family.

In case at bar is readily distinguishable from *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305 (1985), in which this Court rejected a due process challenge to the statute which limits the attorney's fee available in Veterans Administration [VA] proceedings to $10.00.

In VA proceedings, claimants encounter no "opponent" other than a government agency which is required by law to assist them in pursuing their claims. Proceedings are informal and nonadversarial. Most cases are relatively simple, and claimants enjoy the services of various veterans organizations which provide competent assistance, free of charge, to anyone who desires their help in obtaining disability benefits. Under this "user-friendly" system, over half of all VA claims are approved, and claimants with counsel fare only slightly better than veterans represented by service organizations, or proceeding *pro se*.

In black lung benefits proceedings, however, as the lower court correctly noted, claimants encounter a complex and "viciously adversarial" system in which elderly, ailing and unschooled miners and their survivors confront coal mine operators, insurance companies and the government trust fund, all of whom employ skilled counsel to represent them. In many cases, the claimants proceed *pro se*, because the delays and inadequate compensation typical of the black lung program discourage most attorneys from taking such cases. Moreover, during the brief 20-year history of the black lung program, no supporting infrastructure comparable to veterans service organizations has arisen to assist miners in pursuing their claims. In striking contrast to claimants' "success ratio" in VA proceedings, the majority of black

lung claims are denied, and those who are able to retain counsel fare substantially better than those who proceed *pro se*.

ARGUMENT

Judicial Deference

The Department of Labor begins its attack on the lower court's opinion by asserting that "the Court below starkly misconceived its proper role by failing to pay the necessary deference owed to an Act of Congress." Petition at 12. In support of this argument, the petitioner then quotes the following language from the Court's opinion in *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 319 (1985): "Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that [the judiciary] is called upon to perform, and we begin our analysis here with no less deference than we customarily pay to the duly enacted and carefully considered decision of a co-equal and representative branch of our government."

However, the case at bar, unlike *Walters*, does not involve a claim of facial invalidity. The lower court in this case held that the black lung fee system was unconstitutional as applied, *Committee on Legal Ethics v. Triplett*, 378 S.E.2d 82, 89 (W.Va. 1988), but the *Walters* Court did not "determine the merits of the appellees' individual 'as applied' claims." 473 U.S. at 337 (O'Conner, J., concurring).

It is difficult to believe that when Congress created the federal black lung program, it intended to create a system flawed by inordinate delays in paying attorney fees, or that resulted in inadequate compensation for claimants' attorneys. There is certainly no evidence that Congress intended to prevent claimants from obtaining counsel. In fact, such representation is expressly contemplated in the black lung regulations. *See* 20 CFR 725.363(a), 802.202(a), (d) and (e).

It should also be noted that the *Walters* court may have exercised unusual deference in reviewing the VA fee system because "the statute in question . . . [had] been on the books for over 120 years." 473 U.S. at 319. The federal black lung program, on the other hand, has only been in existence for 20 years, and during that brief period of time, it has undergone numerous and extensive revisions and amendments. *See generally Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987); Lapato, *The Federal Black Lung Program: A 1983 Primer*, 85 W.VA.L.Rev. 677 (1983). More specifically, regulations concerning attorney fees in black lung proceedings did not go into effect until August 31, 1972. *Watson v. HEW*, 562 F.2d 386, 388 (6th Cir. 1977).

The Walters Decision

In *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), this Court rejected a due process challenge to the statute which limits the attorney's fee available in Veterans Administration [VA] proceedings to $10.00. Although the petitioners argue that the *Walters* decision compels a similar result in the present dispute, the two cases are so markedly different as to

justify different conclusions concerning the constitutionality of their respective fee systems.[1]

The important thing about the *Walters* opinion for purposes of resolving the present dispute is the reasoning used by the Court in reaching its decision, and not the result itself. Under *Walters*, the lower court was required to balance a number of factors, including the government's interest in retaining the present fee system, the claimants' interest in obtaining black lung benefits, and the danger of erroneous denials of claims if counsel were not available to assist claimants in obtaining benefits. As noted below, the Supreme Court of Appeals of West Virginia did not err in applying this test.

Government Interest in Regulating Fees

The government's interest in requiring approval of attorney fees in black lung cases is ostensibly to prevent responsible operators and the black lung trust fund from being overcharged. These parties are normally represented by counsel, however, and are quite capable of using black lung proceedings to protect their interests.

The government's interest in prohibiting direct fee agreements between claimants and their attorneys is allegedly to prevent overreaching by counsel. Unfortunately, this scheme which was intended to prevent the

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[1] Among other differences, as the Department of Labor repeatedly observes in its brief, "the black lung program is not intended to operate as informally as the VA benefits system at issue in *Walters*." Brief for the Federal Petitioner at 14, 35.

needless depletion of benefits frequently results in claimants receiving no benefits at all, even though "[t]he plain language of the Black Lung Benefits Act states that its single purpose is to provide adequate compensation on account of total disability or death due to pneumoconiosis." Prunty & Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W.Va.L.Rev. 665, 671 (1989). *See* 30 U.S.C. § 901(a).

Whatever interest the government may have in protecting claimants from overreaching and excessive fees is adequately protected by the bar's own normative rules. Between 1970 and 1989, West Virginia operated under a code of professional conduct modeled on the ABA Model Code. Effective January 1, 1989, the state adopted the ABA Model Rules of Professional Conduct. Under both sets of rules, ample provision has been made to regulate overreaching and the charging of excessive fees. *See West Virginia Code of Professional Responsibility*, DR 2-106; *W.Va. Rules of Professional Conduct*, Rule 1.5. Moreover, under the black lung program, attorney fees are *not* paid by claimants – they come from responsible operators or the black lung trust fund.

The Department of Labor also asserts that removing the present disincentives to attorney participation in black lung proceedings may entail some expense on the part of the government. While it may be relevant, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

Of course, what the respondent really objects to in this case is not the required agency approval of attorney fees, or the prohibition against direct fee agreements with claimants, *per se*, but the inordinate delays in payment of attorney fees, and inadequate compensation for attorney fees, which have plagued the system for many years. It is doubtful that the government has any interest in perpetuating these operational flaws, which prevent many needy and deserving claimants from obtaining the benefits to which they are entitled.

Private Interest in Retaining Counsel

Black lung claimants and recipients have important property interests in receiving the statutory benefits to which they are entitled.[2]

Fee limitations also impair enjoyment of an important liberty interest – the right of an individual to consult with attorneys on matters affecting his legal rights. *See Powell v. Alabama*, 287 U.S. 45, 68-9 (1932); *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117-19 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980), and may infringe First Amendment rights of free speech, assembly and

[2] The Department of Labor concedes in its brief that at least one of Mr. Triplett's clients had a property interest sufficient to invoke the protections of due process. Brief for the Federal Petitioner at 20-21. The department also assumes, for purposes of its brief, that Mr. Triplett has standing to raise the due process rights of his clients. *Id.* at 20, n. 7. *Cf. Caplin & Drysdale, Chartered v. United States*, 109 S.Ct. 2646, 2651 n. 3 (1989).

petition, as well. *Cf. United Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 221 (1967).

In addition to impairing the ability of claimants to obtain much needed benefits, excluding lawyers from the system may create an appearance of injustice that detracts from the perceived legitimacy of the claims process. See Popkins, *The Effect of Representation in Nonadversary Proceedings – A Study of Three Disability Programs*, 62 Cornell L. Rev. 989, 1038 (1977).

In terms of need, black lung claimants, as a group, more closely resemble the welfare recipients in *Goldberg v. Kelly*, 397 U.S. 254 (1970), than the disabled veterans in *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985).

Under West Virginia law, a miner will not be able to recover compensation for pneumoconiosis from his employer in a civil tort action. The standard for recovery established by W.Va. Code § 23-4-2 for suits against employers is simply too difficult to meet. *See generally Mooney v. Eastern Energy Associated Coal Corp.*, 326 S.E.2d 427, 433 & n. 2 (W.Va. 1984) (Miller, J., dissenting). Thus, in most cases, a claimant's only hope of obtaining compensation for his black lung related disability lies in some form of state or federal entitlement program.

> The approval or denial of black lung benefits – the determination of disability – for a miner in many instances constitutes a matter of life and death. It very often determines whether a miner and survivors will be able to maintain a halfway decent standard of living. Black lung benefits can mean the difference between adequate or substandard housing; sufficient diet or

undernourishment; and minimal medical care or no medical care for a miner and his family.

Black Lung Legislation, 1971-72: Hearings Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92nd Cong., 1st & 2nd Sess. 2 (1971, 1972) (Statement of Sen. Jennings Randolph) [Black Lung Legislation].

Many recipients do not have other sources of income,[3] and even when other sources are available, they frequently result in a reduction of benefits under the black lung program. Under 30 U.S.C. § 922(b), benefit payments "shall be reduced . . . by an amount equal to any payment received . . . under the workmen's compensation, unemployment compensation, or disability insurance laws of [a miner's] state on account of [his] disability . . . due to pneumoconiosis, and the amount by which such payments would be reduced on account of excess earning . . . "[4] See also 30 U.S.C. § 932(g), 20 CFR §§ 725.533(a)(1), 725.536. Black lung benefits may also be reduced because of "[a]ny compensation or benefits received under or pursuant to any federal law

[3] The federal black lung program was created in 1969 largely because "few states provide[d] benefits for death or disability due to this disease [pneumoconiosis] to coal miners or their surviving dependents." 30 U.S.C. § 901(a). Twenty (20) years later the Secretary of Labor has yet to find that any state, including West Virginia, has a workers' compensation system which "provides adequate coverage for pneumoconiosis." 20 CFR § 722.152(b).

[4] Unlike many states, West Virginia does provide workers' compensation benefits for the victims of occupational pneumoconiosis. *See, e.g.*, W.Va. Code §§ 23-4-1, 23-4-6a.

. . . because of death or partial or total disability due to pneumoconiosis." 20 CFR § 725.533(a)(2). In cases where multiple reductions apply, a claimant's black lung benefits can be, and often are, reduced to nothing. *See* 20 CFR § 725.539.

Black lung benefits are awarded to former miners who are unable to do coal mining jobs or comparable work. *See* 30 U.S.C. § 902(f)(1)(A). On its face, this is a less stringent test of disability than in *Mathews*, where the benefits were available only for inability to do any substantial gainful work in the national economy. 424 U.S. at 336.[5]

As a practical matter, however, coal miners who are unable to continue mining because of black lung are unlikely to find other gainful employment. In addition to suffering from handicaps of age and physical impairment, they tend to live in rural, non-industrial areas of the country where there are few jobs outside of the coal industry,[6] and lack the skills and training to pursue other occupations. Black Lung Legislation at ___, (Statement of Sen. Jennings Randolph), at ___ (Statement of Sen. Richard S. Schweiker), at 117 (Statement of Donald Rasmussen, M.D.); *Black Lung Benefits: Hearing Before the*

[5] Although it should be noted that the Social Security disability program does not require any showing that the claimant's disability is job-related, while the black lung program requires claimants to demonstrate that their disability stems from coal-related employment.

[6] "[B]etter than 80 percent of the Nation's coal miners live in Appalachia." Black Lung Legislation at 330 (Statement of Donald W. Whitehead, Federal Co-chairman, Appalachian Regional Commission).

Gen. Subcomm. on Labor of the House Comm. on Education and Labor, 92nd Cong., 1st Sess. 85 (1971) (Statement of James Haviland, Esquire, black lung attorney) [Black Lung Benefits].

When the Black Lung Act was first enacted, the Social Security Administration used the same eligibility standard discussed in *Mathews.* "This classic standard applied by the Social Security Administration" was quickly abandoned by Congress because "it work[ed] an obvious inequity . . . when applied to coal miners with black lung." Black Lung Legislation at ___ (Statement of Sen. Richard S. Schweiker). See also S. Rep. No. 743, reprinted in 1972 *U.S. Code Cong. & Admin. News* 2313, 2320-21. In *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 21 (1976), this Court held that the definition of "total disability" currently in use was not "unconstitutionally arbitrary and irrational."

Probability of Error

Contrary to petitioners' assertions, the probability of error if claimants are not represented by counsel is very high, a conclusion justified by common sense as well as empirical observation.

The black lung program is much more inhospitable to claimants than the veterans disability system considered by this Court in *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985).[7] Even Before the 1981

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[7] The black lung system is also more adversarial, and less likely to result in claimant awards, than the social security

(Continued on following page)

amendments to the black lung act significantly restricted eligibility for benefits, the approval rate for new claims had fallen to 10% or less. Lopatto, *The Federal Black Lung Program: A 1983 Primer,* 85 W.Va.L.Rev. 677, 695 (1983). Following the 1981 amendments, the approval rate was roughly halved, and now stands at approximately 5%. Brief for the Federal Petitioner at 34; *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 88 and n. 15 (W.Va. 1988) (5.8%). *See also Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor,* 100th Cong., 2d Sess. 67 (1988) (Statement of Cong. Robert E. Wise, Jr.) (citing 4.6% approval rate); *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcommittee on Labor Standards of the House Committee on Education and Labor,* 99th Cong., 1st Sess. 25 (1985) (citing 4% approval rate) (Statement of Donald Redman, President, United Mine Workers, District 5, Belle Vernon, Pa.). By contrast, half of all VA claims are approved. *Walters,* 473 U.S. at 309, 327.

Veterans enjoy the services of various veterans organizations which provide competent assistance, free of charge, to anyone who desires their help in obtaining disability benefits. *Walters v. National Association of*

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disability program challenged in *Randolph v. United States,* 274 F.Supp. 200 (M.D. N.C. 1967) (per curiam), *aff'd per curiam,* 389 U.S. 570 (1968). *See generally Mathews v. Eldridge,* 424 U.S. 319, 339 (1976); Popkin, *The Effect of Representation in Nonadversary Proceedings – A Study of Three Disability Programs,* 62 Cornell L. Rev. 989, 997-1002 (1977).

Radiation Survivors, 473 U.S. at 311-12 & n. 4 (1985).[8] During the brief 20-year history of the Black Lung Act, no comparable infrastructure has arisen to assist black lung claimants.[9]

Once a veteran files a claim, there are few deadlines to meet, and they tend to be quite liberal. For example, if

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[8] The Veterans Administration not only recognizes the right of these organizations to represent veterans, but provides office space for them free of charge, *Stearns v. VFW*, 394 F.Supp. 138, 145 (D.D.C. 1975), *aff'd without opinion*, 527 F.2d 1387 (D.C. Cir. 1976); 38 U.S.C. § 3402; Popkin, *The Effect of Representation in Nonadversary Proceedings – A Study of Three Disability Programs*, 62 Cornell L. Rev. 989, 1028 (1977), an arrangement which tends to foster and support a close working relationship. *See* Popkin, *supra*; Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 Stanford L.Rev. 905, 918-19 (1975).

[9] Although the United Mine Workers of America (UMWA) has represented many claimants in the past, economic considerations have forced it to curtail this service. As of April, 1988, the UMWA was only handling black lung claims for "dues paying members," a restriction which excluded people who had retired as "a mine foreman, a federal inspector or a state mine inspector." *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 75 (1988) (Remark by Harold Hayden, Representative, UMWA District 29). "District 31, one of three districts serving West Virginia, has ceased such representation due to lack of money." *Committee on Legal Ethics v. Triplett*, 378 S.E.2d 82, 92 n. 30 (W.Va. 1988) citing Brief of Amicus Curiae, Jane Moran, attached letter of January 26, 1987 from Eugene Claypole, Jane Darcus and James Sluser of UMWA. *See also Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 75-76 (1988) (Testimony of Sam Pratt, compensation counselor, UMW, District 17).

a veteran is dissatisfied with the ruling of the rating board, he can file a notice of disagreement at any time within one year from the date of mailing of notification of the initial review and determination. *Walters*, 473 U.S. at 311; 38 CFR §§ 19.129, 19.124.

At several stages of black lung litigation, however, there are fairly short deadlines which a claimant may have to meet to preserve his claim. *See, e.g.*, 20 CFR § 725.409(b) (response to deputy commissioner's notice of denial by reason of abandonment) (30 days); 20 CFR § 725.410(c) (response to deputy commissioner's initial finding of non-eligibility) (60 days); 20 CFR § 725.419 (request for hearing or revision of deputy commissioner's proposed decision and order must be made within thirty (30) days of issuance); 20 CFR § 725.479 (request for reconsideration of decision by ALJ must be made within thirty (30) days); 20 CFR §§ 725.481, 802.205(1), (appeal to Benefits Review Board [BRB] from decision of ALJ) (30 days); 20 CFR § 802.205(b) (cross-appeal to BRB from decision of ALJ) (14 days); 20 CFR § 725.482 (appeal from decision of BRB to Circuit Court) (60 days). *See generally* 20 CFR § 725.409(a)(3) (a claim may be denied by reason of abandonment when a claimant fails to pursue his claim with reasonable diligence); 20 CFR § 802.205(c) ("Any untimely appeal will be summarily dismissed by the [Benefits Review] Board for lack of jurisdiction.").

Black lung claimants are usually elderly,[10] unemployed,[11] and sick,[12] with little schooling[13] and relatively

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[10] According to the Department of Labor's 1983 report to Congress, the miner and widow beneficiaries in its survey were "predominately elderly, with a mean age of 70." U.S. Department of Labor, Employment Standards Administration, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14 (1983) [DOL Sample Survey]. *See also Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong. 1st Sess. 115 (1985) [Investigation of the Backlog] (Statement of James DeMarce) ("the typical incoming claim is from someone whose age is somewhere between the midfifties and midsixties").

[11] In 1982, one in twenty miners and widow beneficiaries (5.5%) were employed either full time or part time . . .

> Of the miners living with spouses, 9% had wives who worked sometime during 1982. About 3% of the miner beneficiaries worked for pay at some time since receiving black lung benefits. . . .

DOL Sample Survey at 15. *See also Investigation of the Backlog* at 115 (Statement of James DeMarce) (people typically apply for black lung benefits when "they become seriously ill, and are no longer able to work or they may experience a prolonged layoff in the industry and tend to file for benefits at that time; or perhaps most commonly of all, when they retire they will file a claim for benefits").

[12] As this Court noted in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976), black lung disease is an irreversible, progressive illness for which there is no therapy. It "affects a high percentage of American coal miners with severe, and frequently crippling, chronic respiratory impairment." *Id.* at 6. *See also Mullins Coal Co. v. Director, OWCP,* 98 L.E.2d 450, 457 (1987).

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modest financial resources. See *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong., 1st Sess. 131 (1985) (Statement of John T. Jarvis) ("the average black lung recipient is not a wealthy person. The income to the household in general is usually less than $10,000.00"). Sadly, many miners "use up all of their personal finances for treatment of their illness" prior to receiving black lung benefits. *Delays in Processing and Adjudicating Black Lung Claims: Hearing before a Subcomm. of the House Comm. on Government Operations,* 99th

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In 1982, only 5.5% of miners and widow beneficiaries were employed either full or part time. DOL Sample Survey at 15. "Of those who were not employed during 1982, 72% of the miners and 60% of the widow beneficiaries reported 'ill or disabled' as the main reason for not working in 1982." *Id.*

The general ill health of black lung beneficiaries should come as no surprise, given their advanced age, and the fact that benefits are only available upon a showing of death or total disability due to pneumoconiosis. *See* 30 U.S.C. § 901(a); 20 CFR §§ 718.1, 725.1, 725.201.

[13] In the 1983 DOL survey,

> The typical miner received little formal education; only one in ten graduated from high school. In fact, three-fourths of these miners did not even attend high school. Widow beneficiaries tended to have slightly more education than miner beneficiaries, with 18% being high school graduates. A few of the widow beneficiaries (4%) attended college.

U.S. Department of Labor, Employment Standards Administration, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14 (1983).

Cong., 1st Sess. 10-11 (1985).[14] These disabilities seriously impair their ability to represent themselves in proceedings which are often "viciously adversarial." *Committee on Legal Ethics v. Triplett*, 378 S.E.2d 82, 92 (W.Va. 1988), citing Brief of Amicus Curiae, Jane Moran, affidavit of Robert Cohen at 8-9, affidavit of Frederick Muth at 5-6.[15] *See Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 88 (1988) (Statement of Vincent Carroll, Virginia Black Lung Association) (miners "lack the financial resources necessary to have even a slim possibility of success").

Under 20 CFR § 725.360, responsible coal mine operators and their insurance carriers are parties to black lung

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[14] "Indeed, quite a few miners have died before benefits are awarded forcing their survivors to initiate and process their claims all over again." *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 99th Cong., 1st Sess. 2 (1985) (Remark by Cong. Austin J. Murphey).

[15] It is interesting to note that the corresponding demographic characteristics of the population of veterans are markedly different from those of black lung claimants. For example, even though a large number of surviving veterans served during World War II, the majority of all veterans with compensable disability claims are under 65 years of age. Veterans Administration, *Selected Compensation & Pension Data by State of Residence, Fiscal Year 1987*, page 3. "With a 94-percent participation rate, Vietnam era veterans [are] as likely as their non-veteran peers to be in the labor force." Cohaney, *Labor Force Status of Vietnam-Era Veterans* 13 (Feb. 1987).

proceedings, and needless to say, they have a strong financial interest in opposing claims. "The actuarial value of a 1982 claim by a living miner with a spouse is nearly $150,000.00." Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W.Va.L.Rev. 677, 686 (1983), citing actuarial chart in Black Lung Benefits Act Annual Report, U.S. Department of Labor 33 (Jan. 1981). In addition to disability benefits, responsible operators are liable for a claimant's medical expense, 30 U.S.C. § 932(a), attorney fees, 33 U.S.C. § 928(a), 20 CFR § 725.367, and interest. *Clinchfield Coal Co. v. Cox*, 611 F.2d 47 (4th Cir. 1979); 20 CFR § 725.608(a).

Given the value of a successful black lung claim, it should come as no surprise "[t]hat the responsible operator feels . . . he can well afford . . . to spend $5,000 to $10,000 to fight a non-paid attorney." *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 22 (1985) (Statement of Martin Sheinman, Esquire).

The presence of parties with interests antagonistic to those of claimants results in a markedly adversarial system.[16] More than ninety percent (90%) of the claims

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[16] *See* Smith & Newman, *The Basics of Federal Black Lung Litigation*, 83 W.Va. 763, 764 (1981) (With the transfer of authority from the Department of Human Services to the Department of Labor, Black Lung "claims adjudication procedures have changed dramatically in that what formerly was a non-adversarial action by a claimant against the Federal Disability Insurance Fund, has been transformed into a full adversarial proceeding involving private operator liability.") (footnote omitted)

approved at the deputy commissioner level will be challenged by coal mine operators. *Committee on Legal Ethics v. Triplett*, 378 S.E.2d 82, 92 n. 27 (W.Va. 1988). *See also Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 109 (1985) (Statement of James Sluser, Compensation Director, District 31, UMWA) ("I know of no responsible operator that has agreed to pay a claim without going through administrative law judge procedures"); *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 17 (1985) (Statement of Sen. John D. Rockefeller IV) ("the companies charged with the responsibility for providing the benefits to those miners who do have their claims originally approved almost always appeal the local decision in order to try to contest their liability."). This is a far cry from VA proceedings, in which veterans encounter no "opponent" other than a government agency which is required by law to assist them in pursuing their claims. *See Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985).[17]

Even at the deputy commissioner level, which is intended to be fairly informal in operation, black lung claimants can benefit greatly from the assistance of

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[17] In *Walters*, the Court relied heavily on the non-adversarial nature of VA proceedings in upholding a $10.00 limit on attorney fees, warning that "counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding. . . ." 473 U.S. at 333.

counsel in meeting their burden of proof.[18] The outcome of disability proceedings is often determined by the operation of various legal presumptions which the average claimant is unlikely to know about or understand without professional advice.[19] Attorneys can also play an important role in gathering and interpreting evidence, and presenting the claimant's case. *See generally* Selinger, *What Are Lawyers Good For?: The Radiation Survivors Case, Non-Adversarial Procedures, and Lay Advocates*, 13 Journal of the Legal Profession 123 (1988).

"The typical black lung case presents issues of law; issues of fact; medical issues; and issues which are a combination of law, fact, and medicine." Smith & Newman, *The Basics of Federal Black Lung Litigation*, 83 W.Va.L.Rev. 763, 764 (1981). This Court has frequently acknowledged the value of counsel in dealing with factual, as well as legal, issues. *See In re Gault*, 387 U.S. 1, 36 (1967) ("The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into

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[18] "The initial nationwide approval rate for qualifications for black lung benefits [is] only about 2.8 percent of all claims filed." *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 73 (1988) (Statement of Harold Hayden, UMWA Representative, District 29).

[19] In fact, many black lung "claimants who are not accustomed to legal or administrative proceedings do not really understand the significance of their bearing the burden of proof." *Black Lung Benefits: Hearing Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 92nd Cong., 1st Sess. 78 (1971) (Remarks by Clara Cody and James Haviland, black lung representatives).

the facts, to insist upon regularity of the proceedings, . . . ").

Part of the complexity of black lung practice stems from the fact that the "program has been developed through several statutory enactments [so that] different rules govern claims filed during different periods of time." *Mullins Coal Co. v. Director, OWCP*, 98 L.Ed.2d 450, 457 (1987) (footnote omitted). Consequently, as the lower court observed:

> . . . the history of black lung legislation demonstrates that even the *filing* of a claim for benefits is complex. It often requires a lawyer to determine which benefit structure applies to a particular claim.

Committee on Legal Ethics v. Triplett, 378 S.E.2d 82, 88 (W.Va. 1988) (emphasis in original). The fact that the Code of Federal Regulations currently devotes approximately 155 pages to black lung benefits forcefully demonstrates the complexity of this entitlement program. *See generally* Falk, *Counseling the Coal Miner Suffering From Respiratory Disease*, 83 W.Va.L.Rev. 833 (1981).

Although the deputy commissioner is required to notify an unsuccessful claimant, in writing, "[i]f the evidence submitted does not support an initial finding of eligibility," and to "specify the reasons why the claim cannot be approved," 20 CFR § 725.410(c), many black lung claimants in Appalachia have "limited education and experience in dealing with government," and do not understand why their claims have been denied. *Black Lung Benefits* at 78 (Statement of Clara Cody and James Haviland, black lung representatives).

As claims progress beyond the deputy commissioner level, proceedings become increasingly formal and legalistic. At the Administrative Law Judge [ALJ] level, parties may cross-examine witnesses, 20 CFR § 725.457, take testimony through depositions and interrogatories, 20 CFR § 725.458, make oral arguments and file briefs.[20] 20 CFR § 725.459.[21] The advantage of retaining counsel in such proceedings is obvious. *See Scanlan v. Secretary of HEW*, 428 F.Supp. 313 (E.D. Pa. 1976) (proper interpretation of medical evidence and proper presentation of case necessitated presence of counsel); *Lincovich v. Secretary of HEW*, 403 F.Supp. 1307, 1313 (E.D. Pa. 1975) (unfavorable ruling reversed after claimant obtained counsel).

It is difficult to imagine how the average black lung claimant, with only a grade-school education, could effectively depose a medical or vocational expert retained by his adversary. *See* Goldhammer, *Legal Fees in Nonbusiness Administrative Claims*, 26 Hastings L.J. 1127, 1131-32 (1975). Moreover, "the claimant who does not have a lawyer runs a great risk in trying to answer . . . interrogatories himself, because if he gives inaccurate information or inappropriate information in response to a particular question, that could well come back to haunt

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[20] ALJ decisions are appealable to the Benefits Review Board [BRB], 20 CFR § 725.481, a body whose "functions . . . are quasi-judicial in nature." 20 CFR § 801.103. BRB decisions, in turn, are subject to judicial review by the circuit courts. 20 CFR §§ 725.482, 802.410. There are no provisions for judicial review in the VA disability system.

[21] As the Department of Labor observes in its brief, "proceedings before an ALJ take place in a more adversarial, trial-type setting" than hearings at the deputy commissioner level. Brief for the Federal Petitioner at 37.

him at some further phase in the process." *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards on the House Comm. on Education and Labor,* 100th Cong., 2d Sess. 77-78 (1988) (Remark by Cong. Rick Boucher). *See also Id.* at 77 (Remark by Sam Pratt, compensation counselor, UMWA, District 17) ("the interrogatories alone are so confusing to the claimants").

In black lung proceedings, "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Brotherhood of R. R. Trainmen v. Virginia,* 377 U.S. 1, 7 (1964).[22] According to statistics provided by the Department of Labor, in ALJ proceedings, claimants with attorneys prevail 29% of the time but, when claimants proceed *pro se,* they prevail only 11.6% of the time. *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 98 (W.Va. 1988). Thus, as the lower court noted, claimants with counsel "have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se.*" *Id.* at 97. In addition, the cases of *pro se* claimants "take longer to process." *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor,* 100th Cong., 2d Sess. 73 (1988) (Statement of Harold Hayden, UMWA Representative, District 29).

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[22] Of course, the ALJ, if he is to fulfill his duties as the neutral and impartial arbiter of an adversarial proceeding, cannot function as an advocate on behalf of the claimant. *Shapell v. Director, OWCP,* 7 BLR 1-304 (1984); *Belcher v. Beth-Elkhorn Corp.,* 6 BLR 1-1180 (1984). To suggest otherwise would

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These figures stand in sharp contrast to data concerning ultimate success rates before the Board of Veterans Appeals which indicates that veterans with counsel fare only slightly better than veterans represented by service organizations, or proceeding *pro se. Walters,* 473 U.S. at 327, 331.

This difference in success rates underscores the more difficult nature of black lung claims. As the Court observed in *Walters,* "complex" VA claims amount to only a "tiny fraction" of "the total cases pending." 473 U.S. at 330.[23] "[T]he great majority of [VA] claims involve simple questions of fact, or medical questions relating to the degree of claimant's disability; . . . [and] only the rare case turns on a question of law." *Id.* "The black lung claims process," on the other hand, "is procedurally, factually and legally complex." *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 92 (W.Va. 1988). *See also Mullins Coal Co. v. Director, OWCP,* 98 L.Ed.2d 450, 457 (1987) ("some aspects of the black lung benefits program are rather complex").

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be reminiscent of arguments once made to justify the denial of counsel in criminal cases. *See Betts v. Brady,* 316 U.S. 455, 472 (1942).

[23] Cases in which a veteran asserts injury from exposure to agent orange or radiation account for only about 3 in 1,000 claims at the regional level and 2% of appeals to the BVA. 473 U.S. at 329. Furthermore, not "all such claims would be complex by any fair definition of that term: at least 25% of all agent orange cases and 30% of the radiation cases . . . are disposed of because the medical examination reveals no disability." *Id.*

The value of having legal representation at black lung proceedings is recognized by everyone who can afford to retain counsel. Responsible coal mine operators and their insurance carriers are uniformly represented in black lung proceedings by private attorneys whose fees are not regulated or reviewed by the Department of Labor, while the disability trust fund is represented by attorneys provided by the government.[24]

Unfortunately, the number of attorneys in West Virginia who will represent black lung claimants is small and dwindling. According to the affidavit of Grant Crandall, which was part of the record in the lower court, there are only about twelve (12) attorneys in West Virginia who regularly handle black lung claims. This is a remarkably small claimants' bar given the number of practicing attorneys in West Virginia (over 3,000) and the large number of black lung claims filed in that state (roughly 1/5 of the national total). Although the parties may dispute why this is so, one fact seems unmistakably clear – most attorneys in West Virginia are not willing to practice black lung law on a regular basis. *See Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House*

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[24] The widespread use of attorneys by those with the financial ability to retain them provides strong evidence of the perceived value of counsel in black lung proceedings. *Cf. Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.")

Comm. on Labor Standards, 100th Cong., 2d Sess. 76 (1988) (Testimony of Sam Pratt, compensation counselor, UMWA, District 17) (only two private attorneys handle black lung claims in District 17).

According to the Department of Labor, however, claimants are represented by attorneys in 92% of the cases decided at the ALJ level, which allegedly demonstrates that most people are able to retain counsel under the status quo. Assuming that this statistic is accurate, however, the petitioner's assessment of its significance seems unduly optimistic, because many *pro se* claimants never make it to the ALJ level, while others receive continuance after continuance because they are unable to retain counsel. Prunty & Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W.Va.L.Rev. 665, 272 (1989).

In reality, attorneys willing to do black lung work are so scarce that "[i]t is not uncommon for particularly desperate individuals to offer . . . attorneys unauthorized bonuses as an inducement for accepting employment. . . . [a] fact . . . [which] would most certainly appear to be an indication of the desperation of many . . . potential clients." Respondents' Opposition to Petitions for Certiorari, A-25, Affidavit of Frederick K. Muth. The fact that ALJs find it necessary, "as a matter of practice," Brief for the Federal Petitioner at 37, to assist claimants in locating counsel also provides strong evidence that black lung counsel is not readily available.

The reason for this lack of enthusiasm is widely recognized in West Virginia – the present system of compensating attorneys for black lung claimants.

> . . . those lawyers who agree to handle black lung cases are having trouble being reimbursed by the Black Lung Office. The result is that in some cases we have fees that are backed up three or four years.
>
> What is the ultimate result? It is a deterrent and that means that capable lawyers will not be willing to handle the claimants' cases because they know they can never be paid for them.

Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 3 (1985) (Statement of Rep. Robert E. Wise, Jr.). *See also id.* at 103 (Statement of Roger D. Foreman, black lung attorney); *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 64, 66, 67-68 (Statement of Cong. Robert E. Wise, Jr.).

When the office of Congressman Boucher surveyed all of the lawyers in the 9th Congressional District of Virginia, his staff found only five attorneys who "were still willing to handle black lung cases, and three of those had never handled the cases before. . . ." *Id.* at 77 (Remark by Congressman Boucher).

The office of Congressman Wise made a similar effort to compile and maintain a list of black attorneys in the 3d Congressional District of West Virginia. *Id.* at 75. At least eight of ten people originally on that list have subsequently indicated that they no longer desire any black lung referrals. *Id.*

UMWA personnel have stated that there are similar shortages of private black lung counsel in UMWA Districts 17 and 29. *See Id.* (Remarks by Sam Pratt, compensation counselor, UMWA District 17 and Harold Hayden, representative, UMWA District 29).

In concluding that the current system of compensating counsel in black lung proceedings discouraged most attorneys in West Virginia from handling black lung claims, the Supreme Court of Appeals of West Virginia had the benefit, of government reports and congressional hearings cited in its opinion, the transcript from Mr. Triplett's disciplinary hearing (at which several attorneys testified concerning the operation of the black lung program in West Virginia), the amicus curiae brief filed by Jane Moran, Esquire (who has herself been actively involved in representing claimants in black lung proceedings), *affidavits submitted by five (5) attorneys who constitute approximately one-third (1/3) of the lawyers who regularly handle black lung claims in West Virginia at this time*, and various materials submitted by the Department of Labor to supplement the record.

This Court has long recognized that access to counsel is an important element of due process in both criminal and civil proceedings. In *Powell v. Alabama*, 287 U.S. 45, 68-9 (1932), the Court opined that:

> What, then does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.

* * *

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, due process in the constitutional sense.

In criminal and civil proceedings which involve the deprivation of physical liberty, due process requires the appointment of counsel at state expense if a party is indigent and desires representation. *Lassiter v. Department of Social Services*, 452 U.S. 18, 25-27 (1981).

In cases which do not involve incarceration or some other form of restraint, although "private parties must ordinarily pay their own legal fees, they have an undeniable right to obtain counsel to ascertain their legal rights." *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982). *Accord Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1137 (7th Cir. 1983); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1117 (5th Cir. 1980).

Even in small claims court, where claims are modest and the procedures are deliberately informal, parties must have an opportunity to employ counsel at some stage of the proceedings such as a trial de novo on appeal. *Brooks v. Small Claims Court*, 8 Cal.3d 661, 105 Cal. Rptr. 785, 504 P.2d 1249 (1973) (in bank); *Foster v. Walus*, 81 Idaho 452, 347 P.2d 120 (1959); *Simon v. Lieberman*, 193 Neb. 321, 226 N.W.2d 781 (1975); *Mendoza v. Small Claims Court*, 49 Cal.2d 668, 321 P.2d 9 (1958) (in bank); *Prudential Ins. Co. v. Small Claims Court*, 76 Cal.App.2d 379, 173 P.2d 38 (Cal. Dist. Ct. App. 1946).

The right to retain and employ counsel at one's own expense has also been recognized in a variety of administrative proceedings. *See Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (termination of welfare benefits); *Anderson v. Sheppard*, 856 F.2d 741, 747-48 (6th Cir. 1988) (EEOC hearing); *Mosley v. St. Louis SW Ry.*, 634 F.2d 942, 945-46 (5th Cir.) EEOC proceeding), *cert. denied*, 452 U.S. 906 (1981); *Rex Investigative & Patrol Agency, Inc.*, 329 F.Supp. 696, 699 (E.D. N.Y. 1971) (proceedings under Longshoreman's and Harbor Workers Act); *Brown v. Air Pollution Control Bd.*, 37 Ill.2d 450, 227 N.E.2d 754, 756 (1967).

Although there may be some administrative proceedings which are so simple, informal and non-adversarial in nature that due process does not require that a claimant be allowed to retain legal counsel if he so desires, black lung proceedings are not among them. It is fundamentally unfair to compel a claimant with little schooling and limited financial resources to thread his way through a Byzantine labyrinth of rules, regulations and statutes, and to confront, *pro se*, powerful adversaries employing skilled counsel. "[A]s long as the system remains adversarial between the worker or the widow on one side, armed only with their years of work and suffering, and the government and/or the coal and insurance companies who are concerned only with the cost and their balance sheets, it will never be fair to the worker." *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 100th Cong., 2d Sess. 89 (1989) (Statement of Vincent Carroll, Virginia Black Lung Association).

The requirements of procedural due process are not satisfied by a system which denies vast numbers of meritorious claims by preventing claimants from retaining counsel to represent their interests in complex, adversarial proceedings in which their well-heeled opponents may retain whole stables of legal talent if they so desire.

As Congressman Rick Boucher regretfully observed during the April, 1988 oversight hearing on the administration of the black lung program:

> I really wish this hearing were not necessary. That is, I wish the Black Lung Program were providing assistance to those in need in a timely and effective manner. But unfortunately, that is not the case. Hearings and the issuance of decisions are delayed today beyond reason. Attorneys are increasingly reluctant to accept black lung cases. As soon as claims are filed, the claimants are often besieged with interrogatories from the coal operators at a time when they do not have the legal help necessary to answer those questions.
>
> Worst of all, the black lung approval rate has dropped to only four percent of the claims that are filed. Medical experts agree that a fair approval rate, one that reflects the amount of the debilitating disease which actually exists among claimants is more on the order of 15 to 20 percent, so at least two-thirds of the deserving black lung claimants are being weeded out in a determination process that obviously is in need of repair.

Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 100th Cong., 2d Sess. 4 (1988).

CONCLUSION

Contrary to the assertions of the petitioners, the lower court did not fail to give proper deference to a duly enacted act of Congress, nor did it misunderstand or misapply the results and reasoning of *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985), nor did it lack factual support for its conclusions concerning the operation and effects of the Federal Black Lung Program in West Virginia. Consequently, the decision of the Supreme Court of Appeals of West Virginia should be affirmed.

Respectfully submitted,

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Nos. 88-1671 and 88-1688

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

COMMITTEE ON LEGAL ETHICS OF THE
WEST VIRGINIA STATE BAR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF FOR THE FEDERAL PETITIONER

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In our opening brief, we showed that under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court below erred in holding that the system for awarding black lung attorney's fees violates due process by denying claimants access to counsel. Respondent and

his amici, the Association of Trial Lawyers of America et al. (ATLA) and the United Mine Workers (UMW), disagree with each aspect of our analysis: they seek to diminish the government's interest in fee regulation; they contend that claimants have a surpassing interest in the benefits provided; and they insist that the presence of counsel is a virtual necessity for black lung cases and that changes to the fee system are needed to alleviate the shortage of counsel that they currently perceive. Neither respondent nor his amici, however, adequately show that a widespread shortage of attorneys exists, that any shortage can be attributed to the fee system, or that an attorney is an essential component of due process for a large majority of black lung claimants at all levels of the claims procedure.

1. As discussed in our opening brief (Br. 21-22), the black lung fee system implements the strong government interest in ensuring that the benefits paid to claimants are not depleted through improvident agreements with attorneys. The weight of the government's interest in protecting claimants against such depletion of benefits is well established. See *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305 (1985). Respondent does not seriously dispute that Congress has a strong interest in devising a benefits program that provides funds to eligible claimants, not their lawyers.[1] Instead, respondent contends (Br. 6-7) that the government's interest in protecting claimants in the black lung program does not deserve deference because, in his view, the fee system has the effect of depriving claimants of lawyers, with the result that claimants fail to win benefits.[2]

[1] The UMW, in its amicus brief, acknowledges (Br. 17) that the government has a legitimate interest in "protecting black lung claimants from overreaching attorneys," and agrees that Congress has validly sought "to protect miners from unethical lawyers" (Br. 7). Consequently, the UMW "does not support the complete elimination of all regulation of attorney's fees in connection with black lung disability litigation" (Br. 2). Unfortunately, the UMW fails to appreciate that many of the difficulties it perceives in the current system of fee regulation are inherent in any effort to regulate fees fairly (and provide due process to those who pay them). Compare *In re Snyder*, 472 U.S. 634, 636-637 (1985) (describing attorney's complaints about CJA fee system). This is particularly true in the context of a massive benefits program administered by an agency operating with limited resources. See U.S. Department of Labor, Employment Standards Admin., *Black Lung Benefits Act Annual Rep. on Admin. of the Act During Calendar Year 1987* 1-2 (1989) [hereinafter *1987 Annual Report*] (noting that during 1987, the Department of Labor received, and made initial administrative decisions on, 8,344 claims; 3,946 claims were forwarded to ALJs for hearing; 3,083 claims went to the Benefits Review Board; 1,763 fee petitions were processed; and approximately $3.1 million in attorney's fees was paid by the Trust Fund).

[2] Respondent also asserts (Br. 4) that little deference is owed to the Department of Labor's administration of the fee system because this case, unlike *Walters*, involves a challenge to a federal program "as applied." That argument is incorrect on several levels. First, as the Court in *Mathews* made clear, 424 U.S. at 349, procedures developed by the administrative agencies are entitled to deference. Second, the characterization of this case as involving solely an "as applied" challenge is somewhat misleading. The only way in which the court below considered the fee system "as applied" was in its discussion of whether the fee system discouraged counsel from handling black lung claims. In every other respect, the challenge was essentially a test of the fee system's facial validity: the court did not examine the ap-

Respondent's argument is not actually addressed to the weight of the government's interest in regulating fees; it addresses, instead, the asserted risk of error under the current fee system. The risk of an erroneous result, however, is a distinct consideration under *Mathews*. It is clear that the fee system advances the important goal of protecting claimants from overreaching fee agreements and ensures that benefits awards provide maximum value for the intended beneficiaries. Respondent cannot succeed in downplaying that interest simply by asserting that pursuing it may infringe on other goals of the black lung program. It is the function of the *Mathews* analysis to determine whether the compromise of such competing interests satisfies due process.[3]

Respondent also argues (Br. 7) that there is no need, through fee regulation, to protect responsible operators and the Trust Fund from excessive fees, because those parties can protect themselves. Respondent does not explain, however, how the payor of a claimant's fees could possibly protect itself without a system of regulation designed to provide a neutral forum for determining the "reasonable" fee it must pay. The government has a strong interest in ensuring that the party that must bear a claimant's attorney's fees—be it the Trust Fund or a responsible

plication of the system to any particular claim or class of cases.

[3] In passing, respondent contends (Br. 5) that since the black lung fee system dates only from 1972, its policy deserves less weight than the veterans' fee system considered in *Walters*, which had been embodied in statutes for 120 years. But the regulation of fees in the black lung statute traces its roots to the Longshore and Harbor Workers' Compensation Act, enacted in 1927. See Gov't Br. 27. It, too, reflects a longstanding congressional policy, deserving of deference.

operator—is neither overcharged nor made liable for fees that the statute does not authorize.[4] 30 U.S.C. 932(a) (1982 & Supp. V 1987) (incorporating 33 U.S.C. 928(a)).

Respondent and his amici do little to suggest an alternative to the current fee system, let alone one that would be compatible with the government's interests in protecting claimants and in establishing fair fee awards. Respondent appears to suggest (Br. 7) that there is no need at all for federal fee regulation, because state bar rules adequately protect claimants. This simply disagrees with the view of Congress that supplementary protection of claimants was warranted. Moreover, unlike the black lung fee system, state bar rules do not relieve a claimant from the payment of any fee in a contested case. Those rules cannot maximize the application of funds to the needs of claimants, as the black lung system is designed to do.

Neither respondent nor his amici embrace the suggestion of the court below that a fee multiplier be adopted to enhance compensation for attorneys. Indeed, the amicus brief filed by ATLA recognizes (Br. 7) that such a multiplier would be prohibitive (because of the low approval rate); ATLA also concedes that the legal authority to award across-the-board multipliers is doubtful. Instead, ATLA argues (Br. 3, 5, 7-8, 10) that a contingency fee would furnish a superior vehicle for the compensation of counsel.

[4] Amicus UMW points to the fact that fees are paid not by claimants, but by operators and the Trust Fund, and suggests that this means that the government's asserted interest in protecting claimants from excessive fees is a "red herring." Br. 17-18 n.10. That argument, however, ignores that the protection of claimants is accomplished precisely because fees are shifted to other parties in contested cases.

The contingent fee alternative, however, is less an argument grounded in the Due Process Clause than it is a policy argument more appropriately directed to Congress.

Most puzzling of all is the amicus brief of the UMW, which acknowledges that fee regulation is desirable (see note 1, *supra*), and strongly criticizes the current system, but offers no indication of how it would frame the system to accommodate the interests in protecting claimants while fairly shifting fees to other parties. It may be that there are aspects of the current administrative system that are "cumbersome" or "fraught with delay" (UMW Amicus Br. 2), but the failure of any party to identify an adequate alternative means to serve Congress's claimant-protection purpose underscores that changes to the current fee system would entail significant additional administrative costs. See Gov't Br. 25-28.

2. The principal focus of respondent's argument regarding the asserted risk of error under the current fee system (Br. 12-26) is a description of the hardships that a claimant could face in a "worst case" analysis of the black lung claims process. Yet, to satisfy the "extraordinarily strong showing" that *Walters* requires to sustain a finding of unconstitutionality in a case like this, 473 U.S. at 326, respondent had to demonstrate not only that there was a widespread unavailability of attorneys for black lung claimants, but also that the fee system caused the unavailability, and that attorneys are necessary in order for claimants to have a fair chance to present their claims in the generality of cases. Respondent failed to make any of these showings.

a. We explained in our opening brief (Br. 29-30) that the affidavits and excerpted congressional testimony in the record below did not establish that attorneys are generally unavailable to black lung claimants. Respondent offers no defense of that record other than to list the materials on which the court relied and to assert that it "seems unmistakably clear" that "most attorneys in West Virginia are not willing to practice black lung law on a regular basis." Br. 26, 29. The fact remains, however, that the principal support for that claim consists of statements of five lawyers in West Virginia expressing their impression that it is true.[5]

Respondent unpersuasively counters (Br. 27) the Department of Labor's showing that 92% of claimants at the ALJ level had representatives by pointing to possible reasons for believing that figure to be "unduly optimistic." The burden to establish that the fee system is unconstitutional, however, rests heavily on the challenger to the system. Observing that the government's figures might not present the

[5] The affidavits themselves candidly state that they provide only the impressions of practicing attorneys about the availability of representation. See, *e.g.*, Br. in Opp. App. A18 (Cohen Afft.) (expressing "my belief that very few black lung claimants are now being represented in their black lung claims"); *id.* at A28 (Noone Afft.) (stating that "[t]he above is not empirical fact, but rather gut feeling from practicing black lung law"). Respondent and the amici place great reliance on the view that only about twelve attorneys regularly practice black lung law in West Virginia. Resp. Br. 26; UMW Br. 10-11; ATLA Br. 6 (citing Crandall Afft., Br. in Opp. App. A30). Without questioning the sincerity of the lone affiant cited for this proposition, we submit that a court cannot determine a critical fact bearing on the black lung fee system's constitutionality on so slender a reed as a single affidavit. In 1987, the Trust Fund paid claimants' attorney's fees to 50 attorneys having West Virginia addresses. R. 27 (DeMarce Afft.).

entire picture does not carry that burden. Although the Department's statistics do not purport comprehensively to address all representation questions, they do cast serious doubt on the contention, readily accepted by the court below, that there is such a shortage of lawyers that claimants are generally forced to do without counsel.[6] We acknowledge, of course, that some claimants are proceeding pro se; our disagreement with the court below and with respondent is over the proportion of claimants who are proceeding pro se, and the reasons why they are unrepresented.[7]

b. Respondent also fails to carry his burden of demonstrating that the regulation of fees bears principal responsibility for any shortage of attorneys. Respondent points (Br. 8, 27-29) to "inordinate de-

[6] The UMW's amicus brief (at 10, 15) attacks the Department's figures as "bogus" and "a sham," but backs up this unusually harsh language only with the speculation that some listed representatives may have abandoned representation before the proceedings concluded, and with the observation that the figures do not measure representation at the deputy commissioner level. Whether or not the statistics are definitive, the UMW's unsupported assertion (Br. 15) that "[c]ertainly, only a very small percentage [of claimants] secure a legal representative who will provide them with counsel through the many levels and years of appeal" is not a substitute for proof.

[7] Respondent (Br. 27) and the UMW (Br. 12-13) also rely on the observations of two commentators on the black lung field regarding the asserted prevalence of pro se claimants. See Prunty & Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. Va. L. Rev. 665, 727-728 (1989) [hereinafter *Current Issues*]. That article offers no estimate of the numbers or percentages of pro se claimants, and cites no authority in support of its observation that "more and more" claimants are unrepresented.

lays" in the system, and argues that those delays have discouraged most attorneys from practicing in the black lung field.[8] But neither respondent nor the amici dispute our assertion (Br. 35) that attorneys were generally available for claims adjudicated under pre-1981 law, despite signficant delays in adjudicating those claims. If we assume that there is a present shortage of lawyers, the inference to be drawn from the history of the program is that the determining factor in discouraging counsel is the low approval rate under the 1981 amendments, not simply delay.[9]

Respondent also asserts (Br. 8) that inadequacy of compensation is a factor deterring attorneys from handling black lung cases. Respondent fails to explain, however, why claims of inadequacy in the rate of payment cannot be addressed under the current

[8] The Department of Labor, of course, would prefer to eliminate all backlogs, and is working to do so. Even critics of the black lung program have acknowledged that delays are now being reduced. See *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 79 (1988) (Rep. Murphy).

[9] Even the attorney affidavits submitted to the court, which stressed the fee system as the source of discouragement about black lung cases, reflect that the declining approval rate was a factor as well. See, *e.g.*, Br. in Opp. App. A11 (Cohen Afft.) (listing reasons for restricting black lung practice as "restrictive changes in the law, the inefficient processing of claims by the Department of Labor, and the inability to get paid even in the cases in which I prevail"); *id.* at A24 (Muth Afft.) (attributing decreased attorney interest to the fee system as well as "significantly greater and more stringent requirements for eligibility of claimants as well as the sophistication of defense techniques [which] has resulted in much lower levels of claims allowance by the agency").

fee system, which provides for a "reasonable" attorney's fee. The hourly rates that form the basis of fee awards are assumed to reflect anticipated delays and the attorney's risk of loss. See Gov't Br. 32-34. If, in fact, the present standards for determining whether a fee is "reasonable" fail to achieve the statutory objective of sufficient compensation, the remedy is to be found in a proper application of the statute, not in the Due Process Clause.

c. Respondent's failure to show that attorneys are generally unavailable for black lung claimants, or that the fee system is responsible for the unavailability of counsel, are sufficient reasons for reversing the judgment below. Assuming that both of those points are established, however, there is a third deficiency in the court's analysis that requires reversal. Contrary to respondent's argument (Br. 12-26), there is no showing that in the "generality of cases" (*Walters*, 473 U.S. at 330), the black lung claims process cannot function fairly unless a claimant is represented by counsel.

In arguing that counsel is essential to ensure a fair hearing on a black lung claim, respondent relies (Br. 29-30) on this Court's cases involving criminal proceedings, see *Powell* v. *Alabama*, 287 U.S. 45 (1932), parental rights, see *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), and welfare termination proceedings, where the precise scope of the due process interest in retaining counsel was not squarely presented or analyzed, see *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970). Those cases, of course, do not hold that the presence of counsel is indispensable for a claimant in a disability proceeding. Likewise, none of the court of appeals cases cited by respondent (Br. 30-31) holds that there is an unqualified right to hire counsel in administrative matters.[10]

The teaching of *Walters* is that the due process interest in hiring counsel requires a particularized inquiry into the ability of a pro se claimant to obtain a fair hearing in a given class of cases. Despite the efforts of respondent (Br. 12-26) and amicus UMW (Br. 5, 18) to paint the entire black lung claims process as unalterably inhospitable to pro se claimants, that conclusion does not bear scrutiny. To begin with, there can be no credible assertion that every black

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[10] Indeed, none of the cases cited by respondent has anything to do with fee regulation, and all but two preceded this Court's application of the Due Process Clause to right-to-counsel issues in *Walters*. See *Martin* v. *Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) (addressing limitations on a federal employer's right to restrict its employees in communicating with counsel regarding anticipated lawsuit); *Indiana Planned Parenthood* v. *Pearson*, 716 F.2d 1127, 1137 (7th Cir. 1983) (holding that a minor seeking an abortion without parental notice has a right to appointed counsel); *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, 1117 (5th Cir. 1980) (holding that court order prohibiting counsel from consulting with a client during breaks and recesses in a trial infringed client's due process rights); *Gray* v. *New England Tel. & Tel.*, 792 F.2d 251, 257 (1st Cir. 1986) (holding that district court did not abuse its discretion in requiring a litigant to retain counsel within a reasonable period or proceed to trial pro se); *Anderson* v. *Sheppard*, 856 F.2d 741, 747-748 (6th Cir. 1988) (holding that district court abused its discretion in failing to grant a continuance for a reasonable period to enable litigant to retain substitute counsel); *Mosley* v. *St. Louis S.W. Ry.*, 634 F.2d 942, 945-946 (5th Cir.) (vacating settlement because EEOC denied plaintiff an opportunity to consult with counsel about proposed settlement), cert. denied, 452 U.S. 906 (1981).

lung case involves such inordinately complex issues, or such adversarial proceedings, that attorney assistance is needed to establish the claim. As we noted in our opening brief, the issues in black lung cases involve much medical judgment (Br. 42) and the procedures governing each level of adjudication within the Department of Labor recognize and seek to ameliorate any difficulties that pro se claimants may face (Br. 36-38). Fairly considered, the black lung program is a hybrid of formal and informal procedures.[11] While it is not as informal as veterans' benefits proceedings, it is a far cry from a criminal trial or other adversary proceeding in court.[12]

In arguing that claimants encounter unusual difficulties in black lung cases, respondent relies heavily (Br. 12-13) on the fact that the current claims approval rate is about 5% That reliance is misplaced. The low approval rate under current law reflects

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[11] For instance, respondent admits (Br. 20) that the deputy commissioner level is intended to operate fairly informally, but goes on to note that many cases are appealed to ALJs. The Department of Labor, however, does not ask for hearings before an ALJ if the deputy commissioner awards benefits against the Trust Fund. See 20 C.F.R. 725.411.

[12] We noted in our opening brief (at 35-38) that deputy commissioners assist in getting the claimant a medical examination, ALJs ensure that a pro se claimant is capable of proceeding without counsel, and the Benefits Review Board independently reviews the record in pro se cases without requiring the filing of a brief. In addition, the UMW apparently assists its members in filing claims and in completing black lung forms. See Br. in Opp. App. A20-A21. Indeed, according to sources cited by respondent (Br. 14 n.14), as of April 1988 the UMW was handling claims of its dues-paying members, and two of three districts in West Virginia apparently still provide services. See also UMW Amicus Br. 14-15.

Congress's judgment that under the former provisions, the black lung program was paying a large number of claims that were not adequately justified by medical evidence.[13] See Gov't Br. 17-18. In 1981, however, Congress intended to "restor[e] [the black lung program] as a disability program, and no longer a pension program," and envisioned an approval rate of approximately 4%. 127 Cong. Rec. 31,978-31,979 (1981) (remarks of Sen. Nickles). The low approval rate, therefore, cannot be read as evidence that claimants must have lawyers. Respondent offers no comparative statistics that reliably suggest that pro se claimants fare worse than similarly situated claimants represented by counsel.[14]

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[13] The General Accounting Office (GAO) documented, in reports to Congress, the manner in which prior law permitted the award of benefits without adequate medical evidence. See GAO, *Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* (HRD-82-26) (1982), at 9 (in 84% of sample claims approved by the Department of Labor, there was "no medical evidence of disability or death from black lung or the medical evidence was inconclusive or conflicting"); GAO, *Legislation Allows Black Lung Benefits To Be Awarded Without Adequate Evidence of Disability* (HRD-80-81) (1980), at 8 (in 88.5% of sample claims approved by the Social Security Administration, "medical evidence was not adequate to establish disability or death from black lung"). See also Subcomm. on Oversight of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *The Insolvency Problems of the Black Lung Disability Trust Fund* 5, 7 (Comm. Print 1981) [hereinafter *Insolvency Problems*] (describing liberalization of eligibility criteria in 1972 and 1977 amendments).

[14] As did the court below (Pet. App. 40a), respondent misconstrues (Br. 24) the Department of Labor's figures to establish that represented claimants win 2.5 times as often as pro se claimants. As we explained in our opening brief (at 44), given the small percentage of pro se claimants (8%),

Respondent devotes considerable energy to demonstrating (Br. 15, 18-23) that counsel can be useful in meeting deadlines, responding to adversaries, analyzing legal issues, and handling hearings. We do not dispute that counsel could assist with some aspects of the black lung process, or that some cases may present unusually difficult legal or factual issues.[15] The same was true, however, with regard to the veteran's benefits program considered in *Walters*. 473 U.S. at 330. A far stronger showing is needed to overcome, on constitutional grounds, Congress's policy choice to regulate the fees payable to a claimant's attorney in a disability program.

The court below made no effort to quantify how often special difficulties require the assistance of counsel to prevent error, preferring instead to rely on the general view that the black lung process is "complex" and "viciously adversarial." Pet. App. 22a. Respondent similarly avoids analysis of how often particular complexities occur, how likely it is that an attorney could prevent an erroneous denial, and how frequently the special procedures accorded pro se

a more likely explanation of the comparative rates is that the pro se claimants failed to attract lawyers because their cases were weaker.

[15] That is not to say that we agree with respondent's draconian description of the black lung claims process. For instance, respondent lays heavy emphasis (Br. 15) on the relatively short time limits imposed on claimants for some responses or requests, but the Department provides adequate notice to claimants of those deadlines (Gov't Br. 37). The governing rules also provide a one-year period to seek modification of a denied claim. See 33 U.S.C. 922 (1982 & Supp. V 1987); 20 C.F.R. 725.310.

claimants are inadequate to compensate for the absence of counsel. Absent such a showing, the invalidation of the fee system could be sustained only if the nature of the black lung program inherently requires counsel in the vast majority of cases. Such a stringent necessity for counsel, however, has not been established.[16]

3. The final factor is the private interest at stake. Respondent and ATLA recognize that this case, like *Mathews* and *Walters*, involves disability benefits, but nonetheless argue that the private interest should be equated with the compelling interest in welfare benefits noted in *Goldberg* v. *Kelly*, *supra*. Resp. Br. 9; ATLA Amicus Br. 12-13.[17] Respondent, however, offers no reason for the Court to depart from its evaluation of the same issue in *Walters*. Black lung benefits were not intended to ensure a minimum level of subsistence. Independent welfare programs exist, and are available to black lung claimants, to serve those needs. The interest in retaining disability benefits is not so strong as to require the across-the-board invalidation of the fee system, which would expose at least some claimants to depletion of their benefits by having to spend them on attorney's fees.

In addition to relying on the entitlement "property" interest of claimants, respondent invokes (Br.

[16] The UMW apparently would go further than simply requiring access to counsel and would insist on experienced specialists in black lung cases, because "black lungs claims do not lend themselves to occasional pro bono work by law firms." Br. 7. The Court rejected a similar assertion that specialists were needed for disability claims in *Walters*, 473 U.S. at 328.

[17] The UMW's amicus brief does not refer to this Court's decisions distinguishing between disability and welfare benefits, instead simply asserting that the private interest in black lung benefits is "considerable." Br. 18.

8) an asserted liberty interest of an individual to consult with counsel, and suggests that fee limitations "may" deny First Amendment rights. As we explained in our opening brief (at 46-47), the liberty interest in consulting counsel regarding an administrative claim does not add to the weight of the claimant's constitutional interest; the same may be said of the asserted First Amendment interest in consulting with counsel (an interest never before raised in this case). The Court in *Walters* rejected virtually the same First Amendment argument, finding it "inseparable from [the] due process claims." 473 U.S. at 335.[18] Again, there is no reason for a different analysis to govern here.

4. Respondent does not attempt to balance the *Mathews* factors; instead, he simply insists (Br. 32) that the fee system must give way in order to ensure that lawyers will become available to represent black lung claimants. We do not agree, however, that "vast numbers of meritorious claims" are being denied because of the attorney's fee system. *Ibid.* The black lung program was an unprecedented effort to create a benefits program for a single occupational disease that affected large numbers of people. *Insolvency Problems* at 3; *Current Issues* at 667. The program has provided benefits to literally hundreds of thousands of claimants. *1987 Annual Report* at 1-2. In establishing an attorney's fee system for that program, Congress had to reconcile conflicting goals and policies. Any system for regulating attorney's fees may draw claims that it discourages some lawyers

[18] See also *Ortwein* v. *Schwab*, 410 U.S. 656, 660 n.5 (1973) (per curiam) (rejecting First Amendment challenge to filing fee charged for judicial review of welfare determination for same reasons given for rejecting similar due process challenge).

from participating. Compare *Randolph* v. *United States*, 274 F. Supp. 200 (M.D.N.C. 1967) (per curiam) (Social Security System), summarily aff'd, 389 U.S. 570 (1968). At the same time, fee regulation is a standard means in worker's compensation programs to protect claimants.[19] In the black lung benefits program, fee regulation provides that protection by guaranteeing that in contested cases, the responsible operator or the Trust Fund—not the claimant—will bear the prevailing claimant's fees.

Congress did not intend to preclude lawyers from the black lung process, and, in our view, there is no showing that such a result has occurred. While the interaction of the current low approval rate, backlogs, and the regulation of fees has generated understandable discontent among lawyers, such discontent falls far short of showing that the overall program denies due process to claimants because of the process for awarding attorney's fees.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the West Virginia Supreme Court of Appeals should be reversed.

Respectfully submitted.

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[19] See 4 Larson, *Workmen's Compensation Law*, § 83.13(a), at 15-1300 (1989) (noting that every State regulates the payment of fees in worker's compensation cases).

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On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF AMICUS CURIAE UNITED MINE WORKERS OF AMERICA IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-1671 and 88-1688

UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

GEORGE R. TRIPLETT, *et al.*

COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR,
Petitioner

v.

GEORGE R. TRIPLETT, *et al.*

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF AMICUS CURIAE UNITED MINE WORKERS OF AMERICA IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST

The United Mine Workers of America represents over 200,000 working, retired and laid-off coal miners throughout the United States and Canada. The UMWA has, for decades, been the primary advocate of miners disabled by pneumoconiosis, or "black lung," and devoted a great deal of its energy and resources to the passage of the Federal Coal Mine Health and Safety Act of 1969, 30

U.S.C. Sec. 801 *et seq.*, 83 Stat. 792, which includes the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* (1982 & Supp. V 1987), which is the subject of this case. The UMWA is filing this amicus brief because of its concern that its members, and coal miners generally, are increasingly unable to secure legal representation to assist them with complex, burdensome black lung claims due to an attorney fee system which discourages lawyers from handling their cases. All of the parties to the instant case have given written consent to the filing of this amicus brief.*

It should be noted at the outset that the United Mine Workers does not support the complete elimination of all regulation of attorneys' fees in connection with black lung disability litigation. Rather, the Union comes before this honorable Court to urge that the present fee system is so cumbersome, arbitrary, and fraught with delay, that coal miners are losing, rather than gaining, the statute's protections as legal representation becomes extremely difficult to retain. The Court's ruling in this case will directly affect the ability of miners disabled by black lung to secure the expert advice and representation from lawyers versed in the complexities of the Black Lung Benefits Act.

INTRODUCTION

Throughout the coalfields of the United States, miners toil in the coal mines while inhaling the fine black dust which is produced as the coal is extracted. Slowly but surely, they become progressively disabled as the coal dust settles in their lungs, until pneumoconiosis makes breathing so labored and painful that they can engage in virtually no gainful activity. A young man may enter the mines after leaving high school and find himself suffering from black lung ten years later, when he is in

* The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk of the Court.

his late twenties or early thirties. As the miner becomes increasingly unable to work and to function generally because of black lung, his family suffers the emotional and financial hardship of his disease. In the State of West Virginia, where "coal is king," the population of miners suffering from black lung is especially large.

Although coal miners have long suffered from occupational pneumoconiosis, it was not until 1969 that Congress recognized this disabling disease and passed the Black Lung Benefits Act ("BLBA") as part of the Federal Coal Mine Health and Safety Act.[1] The passage of the Black Lung Benefits Act was prompted, in part, by the failure of state workers' compensation laws to adequately address and compensate black lung disease. 30 U.S.C. § 901(a) (1982 & Supp. V 1987). Since its passage, the BLBA has been amended, and the regulations issued in connection with the statute have gone through numerous changes and permutations. Originally, the legislation covered only underground coal miners and their wives or widows, and pneumoconiosis was defined as "a chronic dust disease arising out of employment in an underground coal mine." 30 U.S.C. § 902 (1969). In 1972, 1977 and 1981, eligibility requirements for black lung disability benefits and the definition of pneumoconiosis were liberalized, but new procedural rules were introduced that made applying for benefits and proving a claim a complicated, frustrating process.[2]

[1] 83 Stat. 792, 30 U.S.C. 801 *et seq.*

[2] Black Lung Benefits Act of 1972, 86 Stat. 151, 30 U.S.C. 901 *et seq.*; The Black Lung Benefits Revenue Act of 1977, 92 Stat. 11; The Black Lung Benefits Reform Act of 1977, 92 Stat. 96; The Black Lung Benefits Amendments of 1981, 95 Stat. 1643; The Black Lung Benefits Revenue Act of 1981, 95 Stat. 1653, 26 U.S.C. 1 note and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 13203(a)(d), 100 Stat. 312, 313, 26 U.S.C. 9501 note (1986).

With the passage of the Black Lung Benefits Amendments of 1981, 95 Stat. 1643, three of the five rebuttable presumptions of pneumoconiosis were eliminated, creating much greater evidentiary burdens for miners applying for benefits.[3] Under the 1981 amendments, restrictions against the Department of Labor's use of second opinions to analyze chest X-rays were eliminated, and restrictions on the interpretation of affidavits in the case of a deceased miner were eased. 30 U.S.C. §§ 202(c) and 203(a) (1982). The amendments also limited the payment of benefits to survivors to those cases where the claimant can establish that the miner's death was due to pneumoconiosis, and allowed for the reduction of benefits where a miner receives "excess earnings." 30 U.S.C. §§ 203(a) and (b). The impact of the 1981 amendments on coal miners' black lung disability claims has been profound—of the 58,680 claims filed between January 1982 and March 1988, only 5.8 percent were finally approved.[4]

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[3] The amendments eliminated the following presumptions: 1) Section 411(c)(2) had allowed a rebuttable presumption that a miner's death was due to pneumoconiosis if he died from a respiratory disease and was engaged in coal mine employment for at least 10 years; 2) Section 411(c)(4) had allowed a rebuttable presumption that a miner not diagnosed as having complicated pneumoconiosis had the disease if evidence demonstrated the existence of a totally disabling respiratory or pulmonary impairment and the miner was engaged in coal mine employment (underground or conditions substantially similar to underground) for at least 15 years; and 3) Section 411(c)(5) had allowed a rebuttable presumption in the case of a survivor of a coal miner who died before March 2, 1978 and who had at least 25 years of coal mine employment prior to June 30, 1971, unless it was established that at the time of death the miner was not partially or totally disabled due to pneumoconiosis.

[4] Statistics provided by the U.S. Department of Labor, Office of Coal Mine Safety and Office of Workers' Compensation Programs; *Delays in Processing and Adjudicating Black Lung Claims: Hearings Before the Employment and Housing Subcommittee of the*

Under the BLBA, Congress created two classes of claims, "Part B" and "Part C" claims. The classification of a claim and the particular set of regulations which govern it depends on the date of the filing of the claim. Part B of the Act governs claims filed before July 1, 1973. Part C of the Act is divided into subsections; one part governs claims filed on or after July 1, 1973 but before April 1, 1980, and the other part covers claims filed after April 1, 1980. Depending on the type of claim, it will be regulated by "permanent criteria" or "interim regulations." Medical and other evidence of black lung which may be used to establish eligibility for benefits is specialized and complex, and may include X-rays, pulmonary function tests, physical examinations, and arterial blood-gas studies. 20 C.F.R. 718.101-718.107. Even the most learned judges have found the statute and its regulations confusing. See, *Pittston Coal Group v. Sebben*, 488 U.S. ——, 109 S.Ct. 414, 102 L.Ed.2d 408, 417 (1988). For the average coal miner, who will most likely have a high school education or less, the application and claim procedure can be a nightmare.

SUMMARY OF ARGUMENT

A miner who applies for black lung disability benefits must prove that he is "totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment." *Pittston Coal Group v. Sebben, supra*, 102 L.Ed.2d at 416. Under the Department of Labor's regulations, a coal miner may introduce evidence of his disability, and, in some cases, raise a rebuttable presumption of disability, by presenting certain medical evidence. Even if the miner presents the

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House Committee on Governmental Operations, 99th Cong., 1st Sess. at 55-56 (1985) (GAO Report HRD-85-19); Pet. App. 14a. The Department of Labor estimates that only 5% of cases are finally approved. Pet. Brief 34.

requisite evidence, it is subject to interpretation by medical experts, and where expert opinions conflict, an Administrative Law Judge is free to find that the evidence does not prove the claim. The degree of specialization which is part of the evidentiary process and the difficulty non-experts have in comprehending the relevant medical evidence has been commented upon by this Court:

> "For the ordinary trier of fact—even an ALJ who has heard many black lung benefit cases—an X-ray may well be meaningless unless it is interpreted by a qualified expert. What may be persuasive to the ALJ, then, is not just the X-ray itself, but its interpretation by a specialist. And, of couse, different experts may provide different readings of the same X-ray." *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 108 S.Ct. 427, 98 L.Ed.2d 450, 463 (1987).

The regulations which govern the miner's claim and his evidentiary burden have been criticized as a "procedural morass." *Id.*, 98 L.Ed.2d at 475 (dissent of Justice Marshall, with whom Justice Brennan joined).

The Seventh Circuit, too, has been impressed with the complexity of the proving a claim under the Black Lung Benefits Act and its regulations:

> "We recognize that the distinction between medical criteria and evidentiary rules is necessarily somewhat elusive. While the requirements set out in Section 727.203 (a)(1)-(5) are medical criteria indicating the existence of a chronic respiratory or pulmonary impairment, the manner in which a miner demonstrates that he has satisfied any one of those requirements is an evidentiary matter. For example, the fact that certain opacities are revealed by a chest X-ray is a medical criterion of pneumoconiosis under

> (a)(1), but whether the X-ray actually reveals these opacities is a question of evidence." *Strike v. Director, OWCP*, 817 F.2d 395, 405 n.7 (7th Cir. 1987).

The decision making process with respect to a miner's eligibility takes place in an adversarial forum, and the litigation of claims requires a high degree of expert knowledge on the part of the attorney representing a claimant. A lawyer who is not familiar with the statute's many and varying procedural requirements, and the specialized medical knowledge surrounding pneumoconiosis, cannot simply pick up a case from time to time, anymore than a general practitioner could litigate a medical malpractice action now and then. Litigation of black lung claims requires a lawyer to devote a great deal of time and energy to developing his or her expertise. It is a highly specialized field of law. Thus black lung claims do not lend themselves to occasional pro bono work by law firms.

If miners disabled by black lung are to find attorneys to competently advise and represent them, they must be able to look to a stable cadre of lawyers who devote themselves to the field. The Department of Labor's present regulations governing the payment of claimant's attorneys' fees, however, discourage lawyers from practicing black lung disability law because it is difficult, if not impossible, to sustain a livlihood from such a practice. The net result is that the miners who so desperately need their advice and counsel do not get it, and are left to face the quagmire of the Black Lung Benefits Act alone. Without this advice and counsel, the promise of relief that the statute holds out to those disabled by black lung becomes illusory, and turns the claim process into a confusing, insurmountable tangle of laws and regulations that overwhelms the average miner.

The attorney fee system under the Black Lung Benefits Act was intended by Congress to protect miners from unethical lawyers. However, the fee system operates in a

manner that is so onerous and hostile to legitimate concerns of lawyers over obtaining reasonable compensation in a timely manner, that the "best and brightest" of claimants' attorneys have given up their black lung practice or are considering doing so. Instead of protecting miners, the attorney fee system is leaving them exposed to skilled, inexhaustible defense lawyers, against whom they cannot possibly battle on their own.

ARGUMENT

THE PRESENT REGULATIONS GOVERNING PAYMENT OF FEES TO A CLAIMANT'S ATTORNEY DISCOURAGES LAWYERS FROM PRACTICING IN THE FIELD OF BLACK LUNG DISABILITY, THEREBY DENYING DISABLED MINERS THEIR FIFTH AMENDMENT RIGHT TO DUE PROCESSS

Section 932 of the Black Lung Benefits Act incorporates provisions of the Longshore and Harbor Workers Compensation Act. Accordingly, a claimant has the right to be represented "in any proceeding for determination of a claim" by an attorney or other representative. 20 C.F.R. 725.362, 725.363. A claim may make its way through several bureaucratic layers. A miner must first file his claim with a deputy commissioner at the Department of Labor, who notifies all interested parties, investigates the claim and determines the miner's eligibility for benefits, and issues a proposed decision and order. 30 U.S.C. § 932(a) (1982 & Supp. V 1987), incorporating 33 U.S.C. § 919; 20 C.F.R. 702.311-702.317. If the deputy commissioner denies the claim, a form letter is sent to the claimant indicating the denial and a sixty day period in which to appeal. It does not, however, provide the claimant with meaningful guidance as to the evidentiary burdens which lie ahead. The Administrative Law Judge conducts a full evidentiary hearing in an adversarial setting. The ALJ's order may be appealed by a party to the Benefits Review Board ("BRB"). *Id.*, 20 C.F.R. 702.317, 702.331-702.351, and 702.391. The notice of appeal to the BRB must be filed with the deputy commissioner within 30 days of the filing of the ALJ's decision. 20 C.F.R. 702.393.

Under the Department of Labor's regulations, an attorney representing a miner in this multi-layered process can obtain fees for his or her service *only* if he or she has won the case and *only* upon a final award. An award of attorney's fees is unenforceable until the claimant receives a final award of benefits. 33 U.S.C. 928(a); 20 C.F.R. 725.367(a); *General Dynamics Corp. v. Horrigen*, 848 F.2d 321 (1st Cir. 1987), *cert. denied*, 109 S.Ct. 554 (1988); *Director, OWCP v. Hemingway Transp. Inc.*, 1 Ben. Rev. Bd. Serv. (MB) 73 (Ben. Rev. Bd. 1974). To obtain a fee, the claimant's attorney must submit an application for fees to the deputy commission, administrative law judge, or appropriate appellate tribunal, depending on the forum before which the services are performed. 20 C.F.R. 725.366. In order to obtain a fee award, the attorney's application must be accompanied by a complete statement of the extent and character of the necessary work done, the professional status of the representative, and his or her customary billing rate. 20 C.F.R. 725.366. No contract or prior agreement between an attorney and the claimant is valid. 20 C.F.R. 725.365. The amount of the fee awarded is discretionary and is determined, inter alia, according to the "necessary work done," "the quality of the representation," the qualifications of the representative, and the complexity of the legal issues involved. 20 C.F.R. 725.366(b). The regulations govern only claimant's attorneys. *Lawyers defending coal companies from black lung disability claims are subject to no such constraints.* Not surprisingly, a coal company or the Disability Trust Fund virtually *never* appears without legal counsel.

These regulations, while intended to protect black lung claimants from unscrupulous lawyers, have had the effect

of discouraging lawyers who genuinely care about black lung victims from practicing in the field. They have found that the heavy paperwork, the delays in obtaining fee awards, the failure of the Department of Labor to recognize the hours of time which complex cases can require, and the risk involved with taking a case in which the claimant does not prevail and therefore having no recourse for payment, all conspire to make black lung disability cases financially onerous.

In its brief, the Department of Labor asserts that the court's finding that the fee system has produced a shortage of lawyers for black lung cases is belied by the Department of Labor's statistics that "92% of the claimants were represented in cases resulting in an award or denial of benefits." Pet. Brief 44. See also Pet. Brief 14. The assertion is simply bogus. While the Department of Labor's statistics may indeed make such a showing, the petitioner fails to point out that the statistics were gleaned from docket sheets where a lawyer was *listed*. It fails to account for cases which never progressed beyond the deputy commissioner stage or which were remanded to the deputy commissioner. It fails to account for the fact that a claimant may list a lawyer as his counsel, and the lawyer may even participate in the early stages of the bureaucratic process, but not continue to represent the claimant throughout the various stages of the lengthy litigation and appeal process. The statistics offered by the Department of Labor are a gloss on the reality that claimants are finding fewer and fewer lawyers to assist them through the many levels of review.

The Department of Labor dismisses the affidavits of five black lung attorneys presented to the Supreme Court of Appeals of West Virginia, averring to the financial difficulties the fee system creates, as self-serving "anecdotal evidence." Unfortunately, and illustrative of the problem, these handful of attorneys now make up more than *one-third* of the entire regular black lung litigation bar in

the State of West Virginia. See, Affidavit of Grant Crandall, paragraph 2, Resp. App. A-30. Mr. Crandall has represented members of the United Mine Workers in a variety of matters, including black lung, for more than thirteen years. Resp. App. A-29. His devotion to the plight of coal miners is unquestioned by the Union, given his many years of hard work on their behalf for relatively little pay. There is no doubt that money is not the driving force behind his practice of law. When a lawyer like Mr. Crandall indicates that his firm may have to reconsider whether to continue representing black lung victims, it is cause for alarm within the Union. The Department of Labor attempts to portray Mr. Crandall, and the other lawyers who submitted affidavits in the proceeding below, as "self-serving" or somehow unscrupulous. They are not. But, as Justice Neely observed:

> "One affiant attorney states that he is currently owed more that $30,000 in fees that have been awarded but not paid . . . In a small, depressed West Virginia town, $30,000 is a substantial amount of money for an individual practitioner. In the long run, as John Maynard Keynes once observed, we are all dead. In the short run, lawyers have offices to run, mortgages to pay and children to educate." Pet. App. 17a.

Indeed, the entire tone of the Department of Labor's brief, in which it almost makes light of the protest of black lung disability attorneys over the fee system, underscores why attorneys find practicing before the agency so frustrating and have become reluctant to continue.

It seems that only the Department of Labor continues to harbor any illusions regarding the impact of the fee system on miners' ability to obtain legal counsel. Even black lung defense counsel have acknowledged that the fee system no longer achieves the desired result of protecting claimants in the litigation process. In a recent article, Allen R. Prunty, the Administrative Manager of

the Federal Black Lung Division at the law firm of Jackson, Kelly, which handles the largest number of defendants' black lung cases nationally, and Mark E. Solomons, a partner with Arter & Hadden who served as appellate counsel for the Department of Labor's coal mine workers compensation program from 1973 through 1978, and as legislative counsel for the Department of Labor from 1978 through 1980, had this to say about Judge Neely's decision in the instant case:

> "The West Virginia Supreme Court of Appeals decision underscores a very real and widespread problem: unavailability of counsel to represent claimants in federal black lung cases. The court was correct in its observation that more and more claimants are forced to represent themselves in hearings before administrative law judges and on appeal to the BRB and circuit courts of appeals. The result is repeated continuances of scheduled hearings, delays in submission of cases for decision on appeal, and an impeded litigation process as judges and appellate tribunals must take care to insure that unrepresented claimants have a fair opportunity to present their cases (footnote omitted).
>
> Although it is true that DOL procedures make it difficult for claimants' attorneys to collect fees, the cause of this problems is more complex. For many years claimants' attorneys were not required to mount a substantial effort to obtain awards for their clients because of the liberal entitlement criteria, particularly the interim presumptions. Now that claimants must prove entitlement on the basis of persuasive medical evidence under Part 718, the representation of federal black lung claimants is a far less attractive prospect. The successful pursuit of a Part 718 claim very simply requires must more effort than was the case under the SSA and DOL interim presumptions. Since DOL does not permit claimants' attorneys to collect a fee if benefits are not awarded (footnote omitted), and since the Black Lung Benefits Reform Act of 1977, as amended, prohibits contingent fees even if an award is made, whatever incentive attorneys may have had to take the cases of federal claimants has largely disappeared. A solution to this problem will require adoption of regulatory changes, and perhaps statutory amendments, to make legal representation of federal black lung claimants less onerous." [5]

The Department of Labor focuses on the determination of the reasonableness of an attorney's fee as the central issue for discontent with the fee system. See, Pet. Brief 21-25, 31. In fact, it is only one of the factors, and not even the most important factor, which makes the fee system, as a totality, unworkable. In its opinion, the Supreme Court of Appeals of West Virginia stressed that numerous aspects of the fee system combine to discourage lawyers from handling black lung cases. They include the delay between the time an attorney takes a case and can finally apply for benefits upon the issuance of a final award (Pet. App. 19a); [6] the inability to collect interest to reflect the loss of income caused by this delay (Pet. App. 20a); the lack of premiums to offset the contingent nature of the work, or fee enhancements or multipliers to account for the services rendered in unsuccessful claims (Pet. App. 20a); the procedural and evidentiary complexity of the statute which requires an attorney to devote

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[5] Prunty, A.R., and Solomons, M.E., *The Federal Black Lung Program: Its Evolution and Current Issues.* 91 W. Va. L. Rev. 665, 727-728 (Spring 1989).

[6] For a case typifying the delay inherent in the claim process, see *Saginaw Mining Co. v. Mazzulli,* 818 F.2d 1278 (6th Cir. 1987) (nine years elapsed between time the miner filed his application for benefits under the BLBA and the time the United States Court of Appeals vacated the ALJ's award of benefits and remanded for processing the claim consistent with procedural requirements of statute.)

a great deal of time and study to black lung litigation in order to competently represent claimants, and makes occasional pro bono work in this area difficult (Pet. App. 18a); and the risk that an attorney will put much time and effort into a case only to find himself unable to collect any fee because the claimant has not prevailed (Pet. App. 20a, 25a-27a).[7]

In spite of an attorney's best efforts, ultimately the risk of losing cases, the burdensome process of submitting fee petitions to a variety of forums, low hourly rates which do not account for much of the time actually spent on a case, and the years it may take to finally prevail in a case and then to get the agency's approval of the fee application, have caused lawyers to reconsider their black lung disability practice. See, Affidavit of Robert F. Cohen, Jr., Resp. App. A-11-13; Affidavit of Robert T. Noone, Resp. App. A-27-A28; Affidavit of Grant Crandall, Resp. App. A-29-A32. And it has not been just private counsel who have felt that financial burden of taking black lung claims. For years, UWMA District 31, which represents UMWA coal miners in approximately the northern third of the State of West Virginia, maintained a Compensation Department for the purpose of providing members with assistance and legal representation in connection with their claims. Resp. App. A-21. However, a decrease in dues income, coupled with the inability to obtain meaningful attorneys fees in connection with black lung cases, forced the District to eliminate the service. This of course, makes the willingness and ability of outside counsel to take cases that the District counsel no longer handle even more imperative. Conversely, as the pool of private attorneys willing to take black lung cases continually shrinks, enoromus pressure is put on UMWA

[7] As discussed *infra*, after the 1981 amendments to the Black Lung Benefits Act, only about 5.8% of all claims ultimately are approved by the time the appeals process is exhausted. Pet. App. 20a.

districts who still provide legal counsel in black lung cases to pick up the slack and carry an unrealistically heavy load. The result is that the miner disabled by black lung must rely on an attorney who is overworked and exhausted, and who often must turn members away because he or she cannot handle any more cases. The coal company defendants, of course, encounter no such problem. There are numerous large, urban law firms who specialize in the defense of black lung claims, and who skillfully use discovery and other evidentiary tools to protract and encumber the investigation and litigation process.

The ultimate victim in the black lung fee system is the very individual the regulations purport to protect—the sick and elderly coal miner. As this brief discussed earlier, the Department of Labor's assertion that 92% of claimants are represented is a sham. Perhaps 92% of all claimants initially contact an attorney about assisting them, or hope that a particular attorney will take their case, and therefore list the lawyer as their counsel, but a far, far fewer number presently manage to secure legal representation. Certainly, only a very small percentage secure a legal representative who will provide them with counsel through the many levels and years of appeal. Instead, if they obtain legal representation, it will more often only be in the preliminary stages of filing a claim and presenting evidence to the deputy commissioner during his investigation. Thereafter, the likelihood that the miner will have legal counsel to assist him decreases significantly.[8] If he desires to continue on his own, he faces an avalanche of legal maneuvering from the coal operator, who faces no such dilemma in finding a lawyer.

[8] In its brief, the Department of Labor emphasizes that Administrative Law Judges help claimants find attorneys. Pet. Brief 37. The fact that claimants cannot independently find lawyers to represent them, but need the assistance of an ALJ, underscores the impact that the fee system has had on the regular, competent claimants' black lung litigation bar.

Coal operators can and do pay their attorneys to appeal successful claims through the entire regulatory maze, to the federal courts of appeal, if necessary. And virtually *every* successful claim by an ALJ is appealed by the employer. The appeal from the ALJ's decision to the Benefits Review Board adds two years to the litigation process. The complexity of the litigation is not an issue for coal operators who have competent counsel, and they spend a great deal to fight black lung claims. Affidavit of Robert F. Cohen, Resp. App. A-16. For a coal operator facing potential liability of $150,000 for a black lung claim, $10,000 to $15,000 for a skilled lawyer is a worthwhile investment. See, Opinion of Supreme Court of Appeals of West Virginia, Pet. App. 22a, n. 29. Defense counsel can, and do, take advantage of discovery procedures which are confusing and burdensome to a coal miner, and obtain an array of expert medical witnesses to contradict whatever medical evidence the miner is able to secure to support his claim. Affidavit of Robert F. Cohen, Resp. App. A-16. The coal miner is, at best, bewildered by the experience, and, more often, embittered by it.

The Department of Labor's attempt to persuade this court that where a miner cannot obtain an attorney, he receives the caring assistance of the deputy commissioner or the Administrative Law Judge as a *pro se* claimant is simply disingenuous.[9] See, generally, Pet. Brief 35-38. As Judge Neely so aptly pointed out, the enormous amount of evidence which defense counsel usually develops to defeat a miner's claim, the burdensome discovery procedures it resorts to, and the procedural maneuvering, creates a "highly adversarial process." Pet. App. 28a. The Department of Labor itself admits the adversarial

[9] The Department of Labor discusses an informal conference which the deputy commissioner may hold to assist the claimants with the resolution of his claim. Pet. Brief 36. While such an informal conference may appear in DOL's regulations (20 C.F.R. 725.416(a)), they are no longer held, in reality.

setting of the ALJ proceedings, and concedes that the black lung program is not conducted in the informal manner of the VA benefits program. Pet. Brief 14, 35, 37. For the average miner, attempting to determine the class of claimants he belongs in, how to proceed, what the time limitations are at various levels of the bureaucratic process for going forward, and how to develop and introduce the requisite medical evidence to sustain his claim is understandably beyond him. The statute is so complex, both from a procedural point of view as well as an evidentiary one, that even an untrained attorney finds it difficult to take a case. Without the assistance of competent counsel to advise him, represent him, and help him understand the claim process, the miner is overwhelmed.

In the final analysis, the fee system operates in a manner which results in the denial of legal counsel to black lung claimants. The need for competent counsel in the confusing regulatory process is intimately linked to a miner's ability to effectively pursue a meritorious claim of entitlement to the black lung program's benefits. These benefits are a statutorily created property interest protected by the due process clause of the Fifth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).[10] Under the analysis enunciated by this Court in *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) this amounts to a violation of the due process clause of the Fifth Amendment. Here, while the government undoubtedly has a legitimate interest in protecting black lung claimants from overreaching attorneys[11] (and

[10] The Department of Labor agrees that "recipients of black lung benefits have a 'property' interest in continuing to receive benefits to which they are entitled under the statute." Br. Brief 13. See also, *Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1132-33 (8th Cir. 1984).

[11] This argument is somewhat of a "red herring." Attorney fees do not come out of the miner's pocket. Rather, the responsible

the Union is in agreement with that interest), it is clear that the regulations have not had the desired effect, but have discouraged competent, concerned lawyers from taking claims.

Thus the regulations fail to serve the interest articulated by the Department of Labor in this case. The risk to coal miners disabled by pneumoconiosis that their entitlement to black lung benefits will be jeopardized by the lack of legal representation is readily apparent from the complexity of the statute and the regulations, and the adversarial nature of the claim process. Finally, the private interest at stake is considerable, given that black lung benefits are awarded only where the miner is totally disabled or deceased, and unable to engage in any sort of gainful employment, thus making the benefits financially imperative for him or his survivors.

The Department of Labor's fee system also raises First Amendment issues. "That the states have the broad power to regulate the practice of law is, of course, beyond question (citation omitted). But it is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms." *UMWA* v. *Illinois Bar Assn.*, 389 U.S. 217, 222 (1987). The fee system promulgated under the BLBA in the interest of regulating the unscrupulous practice of law cannot operate in a manner which violates the First Amendment right of black lung claimants.

Finally, there is one point over which the United Mine Workers and the Department of Labor are in complete agreement. The touchstone of procedural due process is "fundamental fairness." *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 24 (1981), Pet. Brief 20. For the Department of Labor to adopt and enforce regulations that

operator or the Disability Trust Fund pays claimants' attorneys fees.

essentially establish an unbalanced process whereby everyone has free access to lawyers except the black lung victim, is fundamentally unfair.

CONCLUSION

Based on the foregoing, the judgment of the Supreme Court of Appeals for West Virginia should be affirmed. The Union respectfully submits that if this honorable Court concludes, as petitioner urges, that the record is insufficient to support its finding that the attorney fee award system under 20 C.F.R. 725.362-725.367 violates the due process clause of the Fifth Amendment, that it remand this case with instructions to develop the record accordingly.

Respectfully submitted,

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FOR ARGUMENT

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Nos. 88-1671 and 88-1688

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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In The

Supreme Court of the United States

October Term, 1989

No. 88-1671

United States Department of Labor,
Petitioner,

v.

George R. Triplett, et al.,
Respondents.

No. 88-1688

Committee on Legal Ethics of the
West Virginia State Bar,
Petitioner,

v.

George R. Triplett, Et al,
Respondent.

On Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

BRIEF OF AMICUS CURIAE
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
VIRGINIA TRIAL LAWYERS ASSOCIATION

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Pursuant to Rule 36.2 of this Court, and with the written consent of the parties filed with the clerk of this Court, the Association of Trial Lawyers of America and the Virginia Trial Lawyers Association submit this brief as amicus curiae in support of Respondent George R. Triplett.

INTEREST OF AMICUS

The Association of Trial Lawyers of America [ATLA] is a national voluntary bar association of over 60,000 trial attorneys across the nation. ATLA members primarily represent the victims of tortious misconduct and discrimination, as well as those accused of crimes. ATLA dedicates its efforts to protecting the rights of injured victims and to promoting the availability of qualified legal counsel to secure those rights. It is ATLA's firm conviction that a system which purports to extend benefits to those who have become disabled in doing this country's work, while denying the means to obtain legal assistance to obtain those benefits, truly deprives them of due process.

The Virginia Trial Lawyers Association [VTLA] is a professional association of more than 2,000 members. Founded in 1960, VTLA is dedicated to promoting professionalism within the trial bar, enhancing the competence of trial lawyers, and protecting and preserving the liberties, rights, and benefits of an efficient and constitutionally sound judicial system. VTLA members have participated in black lung claims and are vitally interested in the issues presented in this appeal.

SUMMARY OF ARGUMENT

The contingent fee agreement has been called the "key to the courthouse" for the injured and indigent.

Department of Labor regulations prohibit this means of assuring that legal representation will be available to claimants under the Black Lung Act. Instead, the Department has promulgated fee regulations which, as applied, discourage attorneys from representing claimants under the Act. The Supreme Court of Appeals of West Virginia, based upon substantial evidence, found that delayed payments, low payments, and nonpayment of attorney fees have made it difficult for black lung victims to obtain counsel. These findings are worthy of great deference. They find strong support in the record of this case and are not significantly refuted by the figures presented by the Department.

Contingent fee agreements are a reasonable means of assuring that legal representation will be available to claimants, and should not be prohibited. The high rate of denials in black lung cases makes it virtually impossible to set hourly rates that would spread the cost of unsuccessful actions among all claims. Contingency agreements, however, are ideally fashioned for such circumstances. While Congress is legitimately concerned with protecting victims against depletion of benefits, this can be accomplished here, as it has in other areas, by placing limits on the percentage of contingency fees.

The deprivation of counsel found by the West Virginia Supreme Court of Appeals amounts to a violation of the claimants right to Due Process. While this Court has upheld very stringent limits on attorney fees in veterans benefits proceedings, that decision rested on a set of distinctive circumstances that ameliorated the effect of lack of counsel. Compared with veterans, black lung claimants encounter a far more adversarial system, including opposing counsel, governed by complex legal, factual, and procedural requirements. Moreover, black lung benefits are of crucial importance to those who are entitled, who are

totally and permanently disabled. Regulations which have the practical effect of depriving claimants of counsel under these circumstances clearly violate fundamental fairness.

ARGUMENT

I. THE ATTORNEY FEE PROVISIONS OF THE BLACK LUNG BENEFITS ACT, AS APPLIED TO PROHIBIT CONTINGENT FEES, DEPRIVE BLACK LUNG VICTIMS OF COUNSEL.

A. BLACK LUNG CLAIMANTS ARE SERIOUSLY RESTRICTED IN OBTAINING REPRESENTATION BY COUNSEL.

The issue before this Court, though it comes dressed in the prosaic garb of administrative regulation, is one of fundamental fairness. Our commitment to this constitutional principle is measured by society's treatment of its most vulnerable and powerless members. This case has its origins in human tragedy, eloquently described by Justice Neely for the court below: "A high price is demanded of those who extract the life's blood of West Virginia's economy from the arteries of her mountains. As his lungs become clogged with insidious and pervasive dust, the miner . . . feels himself increasingly weakened and helpless, unable to provide even the most modest means of support for his family." *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82 (W. Va. 1988).

Congress enacted the Black Lung Benefits Act, 30 U.S.C. 901 et seq. to provide benefits "to those who have become totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment." *Pittston Coal Group v. Sebben,* 109 S.Ct. 414, 417 (1988). The Act provides for compensation to

those who represent claimants only upon approval of the adjudicating authority. 30 U.S.C. §932.

The contingency fee agreement, widely used in private personal injury suits and in certain actions against the government, has deservedly been called the "key to the courthouse" for injured victims who could not otherwise afford to retain counsel. *See, e.g.* Corboy, *Contingency Fees The Individual's Key to the Courthouse Door*, 3 Litigation 27 (Summer 1976). At issue in this case are the Department of Labor [hereinafter "DOL"] regulations under the Act which prohibit contingency fee agreements, 20 C.F.R.§ 725.365, and limit attorneys to fees approved by the adjudicating authority which "shall be reasonably commensurate with the necessary work done." 20 C.F.R. §725.366.

The court below took care to state that the statute and regulations at issue are not unconstitutional on their face. 378 S.E.2d at 89. In actual practice, however, the regulatory scheme has proved to be a poor substitute for the contingency fee agreement in assuring the availability of counsel for claimants. Attorneys have encountered severe problems of low payments, delayed payments, and even nonpayment of fees. *Id.* at 89-91. The conclusion of the West Virginia court is disturbing, yet compelling:

> [W]e find that the DOL system of awarding attorney's fees does, in fact, severely restrict claimants' ability to find competent lawyers to represent them, and therefore, the system violates due process . . . *Id.* at 93.

This conclusion by the highest court of West Virginia is based on specific factual findings that are worthy of great deference. The court carefully considered evidence adduced at a hearing on the practical effect of the

DOL fee provisions, briefs of interested parties, numerous attorney affidavits, and congressional testimony. 378 S.E.2d at 85 & 89.

DOL's denigration of this evidence as "anecdotal," Brief for the Federal Petitioner at 14 [hereinafter "DOL Brief"] hardly establishes that the court's findings were clearly erroneous or without substantial support. While affidavits of five attorneys might appear to be a limited showing, there is evidence that only "approximately one dozen" attorneys in all of West Virginia regularly undertake a significant number of black lung cases. Affidavit of Grant Crandall, in Brief in Opposition to Pet. at A-30. Amicus also believes that further investigation will reveal that claimants in other states face similar hardships in obtaining legal counsel. Moreover, the court granted a rehearing at which the DOL presented its own statistical evidence. The court specifically addressed the DOL figures, and then reaffirmed is finding that serious barriers to obtaining legal assistance exist for black lung claimants. 378 S.E.2d at 96-98. Informed commentators agree that the unavailability of attorneys is a "very real and widespread problem." Prunty and Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues,* 91 W. Va. L. Rev. 665, 727 (1988-89). DOL itself concedes that "some attorneys have found it not worthwhile to represent black lung claimants." DOL Brief at 18.

DOL's defense of its fee provisions relies heavily on it own statistic that 92% of claimants before an ALJ were represented. DOL Brief at 14. The court below took the DOL figures into account in making its determination. 378 S.E.2d t 98. Additionally, the DOL statistic is rendered suspect by the manner in which claimant list counsel, as pointed out in the brief of the United Mine Workers as amicus curiae. DOL itself concedes that it does not generally prepare statistics on the rate of representation in

black lung cases and indicates that a forthcoming report by the General Accounting Office will provide more detailed information. DOL Brief at 30 n.13.

Amicus submits that the West Virginia Supreme Court of Appeals' factual finding, that the DOL fee provisions as applied deprive black lung claimants of counsel, is supported by substantial evidence.

B. CONTINGENT FEE AGREEMENTS ARE THE ONLY REASONABLE MEANS OF ASSURING THE AVAILABILITY OF LEGAL REPRESENTATION FOR VICTIMS OF BLACK LUNG DISEASE.

The inescapable fact is that Black Lung Act claims involve a high risk of failure and long delays in processing. DOL does not dispute these determinations. These conditions, the West Virginia Court found, as they affect fees, are the primary reasons that attorneys are reluctant to represent victims. 378 S.E.2d at 91. The contingent fee agreement is a reasonable means by which lawyers and claimants may overcome this problem and should not be prohibited.

DOL's response, that Mr. Triplett and other attorneys could accommodate the risks and delays inherent in the system by raising their hourly rates, is no solution. In view of the 95% failure rate for claims, a fee multiplier that would account for the risk of nonsuccess would be prohibitive. Suggesting such an alternative hardly coincides with the DOL's stated concern with protecting the Trust Fund. Moreover, it is not clear at all that this Court is prepared to approve an across-the-board multiplier, let alone one of such magnitude. *See Pennsylvania v. Delaware Valley Citizens Council,* 483 U.S. 711 (1987).

Amicus suggests that a more suitable means of assuring that qualified counsel will be available to claimants already exists in the form of contingent fee agreements. DOL maintains that Congress' intent was to protect insured claimants from "improvident agreements that needlessly deplete their benefits." DOL Brief at 22. DOL cites no authority to support this divination of legislative intent, though it is certain that Congress did not intend the situation found by the West Virginia court. "Unfortunately, the result of these regulations has been to make lawyers almost entirely unavailable to claimants. 378 S.E.2d at 91-92.

The decisions that DOL does cite stand only for the proposition that Congress has a legitimate interest in preventing lawyers from *overcharging* their clients. Amicus points out that Congress has approved contingency fees with adequate safeguards to protect claimant-clients in similar circumstances. Claims under Federal Tort Claims Act, 28 U.S.C. 2687, for example, may be pursued on a contingency fee basis, with a limit of 25%. Likewise, claimants for Social Security benefits may obtain counsel under a contingency fee, which must not exceed 25% 42 U.S.C. 406(b)(1). Significantly, in the cases involved here, Mr. Triplet's agreement with each of his six clients provided for a 25% fee, the precise amount that Congress has approved for other claimants.

II. THE DEPRIVATION OF COUNSEL UNDER THE ATTORNEY FEE PROVISIONS OF THE ACT VIOLATES DUE PROCESS.

This Court recently indicated that deprivation of counsel in civil cases does not, of itself, violate due process. *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985). That decision, however, does not

determine the outcome of the due process challenge in this case. Indeed, the *Walters* Court cautioned that due process "is a flexible concept," which "will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation occurs." *Id.* at 321. In applying the test set out in *Mathews v. Eldridge,* 424 U.S.319, 335 (1976) the Court indicated that the VA benefits procedure presented several distinctive features which ameliorated the effect of the inability to obtain counsel. Foremost was the uncomplicated, nonadversarial nature of the system devised by Congress to process veterans' claims. The circumstances faced by a black lung claimant are far different and demonstrate that depriving such claimants of counsel constitutes a significant due process violation.

A. BLACK LUNG CLAIMANTS ARE OPPOSED BY COUNSEL.

The most significant distinction between a VA proceeding and a proceeding under the Black Lung Act is also the most obvious: the presence of opposing counsel. This Court explained in *Walters*

> While counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding, where as here no such adversary appears, and in addition a claimant or recipient is provided with substitute safeguards such as a competent representative, a decisionmaker whose duty is to aid the claimant, and significant concessions with respect to claimants burden of proof, the need for counsel is considerably diminished. 473 U.S. 333-34.

Mine operators, it should not be overlooked, are not limited in the amounts that they can spend in retaining top-

flight legal talent to fight claims by disabled miners. Common sense would appear to dictate that if one party in a controversy recognizes the need for legal counsel, it is likely that the opponent also needs an attorney. DOL itself notes that "Congress could reasonably conclude that black lung claimants -- consisting primarily of elderly coal miners and their survivors -- are susceptible to exploitation and require protection against depletion of their benefits." DOL Brief at 24. Amicus respectfully submits that representation by an attorney whose interest under a contingency fee agreement is to preserve those benefits, advances Congress' objective. A system which has the practical effect of sending such vulnerable persons unarmed and unaided into the lion's den hardly comports with Congress' solicitude.

B. BLACK LUNG PROCEEDINGS ARE ADVERSARIAL

In an exercise in understatement, DOL concedes that "the black lung program is not intended to function as informally as the VA benefits system at issue in *Walters*." DOL Brief, at 35. The fact of the matter is, as the West Virginia court pointed out, proceedings under the Black Lung Act are "viciously adversarial." 378 S.E.2d at 92.

C. BLACK LUNG CLAIMS POSE SIGNIFICANT QUESTIONS OF LAW, FACT AND PROCEDURE.

"The right to be heard would be, in many cases, of little avail," Justice Southerland remarked in *Powell v. Alabama,* "if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." 287 U.S. 45, 69 (1932). Congress' well-intended program stands as a citadel of near Byzantine complexity. *See generally,* Prunty and Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues,* 91 W. Va. L. Rev. 665 (1988-89).The onion-like layers of eligibility provisions, the

factual difficulty in tracing the responsible mine operator, the difficult medical questions of causation associated with pneumoconiosis, are but a few of the daunting legal, factual, and procedural hurdles that Black lung claimants face. As Justice Neely states, "a claimant who appears without a lawyer is in for a baffling and frustrating experience." 378 S.E.2d at 88. Even DOL's statistics establish that represented claimants succeed 2.5 times oftener than pro se claimants. *Id.* at 98.

D. BLACK LUNG VICTIMS DO NOT RECEIVE CLAIMS ASSISTANCE APART FROM REPRESENTATION BY COUNSEL.

The *Walters* court attached great importance to the fact that VA claimants, though unable to obtain an attorney, frequently received assistance from knowledgeable representatives provided by veterans service organizations. No similar alternative representation exists for black lung claimants. 378 S.E.2d at 92.

More importantly, the procedure in *Walters* provided "a decisionmaker whose duty is to aid the claimant." 473 U.S. 334. DOL asserts that it, too, provides assistance to unrepresented claimants. DOL Brief at 35-38. Most of the services enumerated by DOL, however, amount to no more than instructing claimants in properly filling out forms, explaining the reasons for denial of claims, and waiving the requirement of a brief to the Review Board. While helpful, such aids do not address the complex legal and factual complexities of claims. Ironically, one form of assistance to pro se claimants that DOL lists is providing the names and addresses of attorneys who represent black lung claimants. DOL Brief at 37

A process that may appear hospitable to claimants may nevertheless be hostile in practice, as subsequent

developments in the *Walters* case attests.

> Further, subsequent proceedings in *Radiation Survivors* in which the district court (following a suggestion in Justice O'Connor's concurring opinion) certified radiation claimants as a special class who could allege an entitlement to counsel because their claims are complex, [*National Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595 (N.D. Cal. 1986)] have unveilled a picture of the VA's administrative process far different from the one painted by Justice Rhenquist. The District Court has heard evidence of a VA reward system that based merit pay and promotions for adjudicators on simply closing cases, sometimes without even requesting basic documentation; the VA has been fined by the court for willfully destroying evidence sought by the plaintiffs; and a prominent private attorney has been appointed Special Master to oversee the agency's compliance with future discovery orders. The House and Senate Veterans Affairs Committees are also investigating VA mismanagement in handling disability claims. Selinger, *What Are Lawyers Good For?: The Radiation Survivors Case, Non-Adversarial Procedures, and Lay Advocates,* 13 J. Legal Profession 123, 129-130 (1988).

E. THE PROPERTY INTEREST AT STAKE IN BLACK LUNG PROCEEDINGS IS OF GREAT SIGNIFICANCE.

Yet another factor in determining whether a deprivation of counsel amounts to a deprivation of due process is the magnitude of the private interest at stake in the particular proceeding. *Lassiter v. Department of Social Serv.*, 452 U.S. 18, 31-32 (1981). This Court has found that the termination of welfare benefits involves a weighty

private interest, since the benefits represent "the very means by which to live." *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). The *Walters* court determined that the benefits at stake in a VA proceeding "are more akin to the Social Security benefits involved in *Mathews* than they are to the welfare payments upon which the recipients in *Goldberg* depended for their daily subsistance." *Walters*, 473 U.S. at 334.

Amicus submits that the Black Lung benefits, from the perspective of the claimant's interest, is clearly akin to those in *Goldberg*. The legislative history indicates that congress enacted the 1981 amendments to restore the program "as a disability program, and no longer a pension program." 127 Cong. Rec. 31,978, quoted in DOL brief at 18. There is no better indication of the crucial importance of these benefits to claimants than that advanced by DOL itself. DOL argues with considerable vigor that Congress viewed the benefits as so important to recipients that none should be diverted to attorneys. Brief of DOL, at 24-25. In view of that contention, DOL cannot credibly assert that the interest of claimants in such benefits is not significant. DOL Brief at 44.

Amicus submits that the balance of interests which determine the meaning of "due process" in a particular procedural environment clearly supports the conclusion of the highest court of West Virginia, that the DOL regulations relating to compensating attorneys for representing claimant under the Black Lung Act are violative of the Due Process Clause of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Court to affirm the judgment and order of the Supreme Court of Appeals of West Virginia.

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